TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 227.

A. J. GREGORY, PLAINTIFF IN ERROR.

vs.

W. A. MORRIS AND C. E. POTEET.

IN ERROR TO THE SUPREME COURT OF WYOMING TERRITORY.

FILED OCTOBER 16, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 227.

A. J. GREGORY, PLAINTIFF IN ERROR,

vs.

W. A. MORRIS AND C. E. POTEET.

IN ERROR TO THE SUPREME COURT OF WYOMING TERRITORY.

INDEX.

	Original.	Print.
Assignment of errors	1	1
Petition	20	5
Proceeding of district court, second judicial district	29	8
Summons	89	28
Judgment supreme court	91	28
Opinion	93	29
Affidavit of value	104	32
Bond	106	33
Writ of error	110	34
Citation	112	35
Certificate of clerk	114	35
Certificate of judge	115	36

1 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

A. J. GREGORY, PLAINTIFF IN ERROR,
vs.
W. A. MORRIS AND C. E. POTEET, DEFENDANTS IN ERROR.

Assignment of errors.

And now comes the said plaintiff in error and alleges that the supreme court of the Territory of Wyoming, to which the writ of error is directed in the above cause, upon the hearing and determination of said cause committed divers material errors of law prejudicial to the said plaintiff in error, which errors are as follows, to wit:

1. That said supreme court erred in sustaining the ruling of the district court, before which the said cause was tried, in instructing
2 the jury as follows, to wit: "The jury must compute the damages, and return their verdict on that computation in dollars and cents; and if the jury find the contract on the part of the plaintiff was to pay a certain sum of money in gold, they will compute the difference between gold and currency, and render their verdict in dollars and cents in currency;" and in not reversing the judgment of said district court because of the giving of said instruction to the jury.

2. That said supreme court erred in sustaining the ruling of said district court in giving to the jury, upon the trial of this cause, the *the* following instruction: "That the written contract between Morris and Gregory, in connection with the bill of sale, the receipt, and the power of attorney to Poteet, necessarily explain and define the rights
3 and interests of the parties to this action in the property in question;" and in not reversing the judgment of said district court because of the giving of said instruction to the jury.

3. That said supreme court erred in sustaining the ruling of said district court in giving to the jury, upon the trial of this cause, the following instruction: "That by and under those papers the defendants had a legal right to take possession of the cattle in question on or after the 1st day of October last, and retain such possession for the purpose of selling them according to the terms of said contract;" and in not reversing the judgment of said district court because of the giving of said instruction to the jury.

4. That said supreme court erred in sustaining the ruling of said
4 district court in giving to the jury, upon the trial of this cause, the following instruction: "That if the jury find that Poteet, in pursuance of his power of attorney, took possession of said cattle, and removed them to Alsop's ranche for the purpose of selling them, according to the terms of said contract, then they must find the right of possession in the defendant at the commencement of this action, and must assess such damages for the defendants as are just and proper;" and in not reversing the judgment of said district court for the giving of said instruction to the jury.

5. That the said supreme court erred in sustaining the ruling of said district court in giving to the jury, upon the trial of this cause, the following instruction: "That the pleadings in this case put in issue only the right of possession at the time of the service of the writ of replevin,
5 and you are instructed that the right of the plaintiff in these cattle

at that time was only a right of redemption as a mortgagor after condition broken; and that he had no right to the possession of the cattle, and no right to take them, by replevin or otherwise, from these defendants, or either of them, until he had paid or tendered the amount due on them under the contract;" and in not reversing the judgment of said district court because of the giving of said instruction to the jury.

6. That the said supreme court erred in sustaining the ruling of said district court in giving to the jury, on the trial of this cause, the following instruction: "If the jury find that by the terms of the written contract, which must govern in this case, that the defendants, on the 1st day of October, 1875, had a right to sell these cattle, the right to
6 sell necessarily carries with it the right of possession;" and in not reversing the judgment of said district court because of the giving of said instruction to the jury.

7. That said supreme court erred in sustaining the ruling of the said district court in refusing to give to the jury, on the trial of this cause, the third instruction requested by plaintiff in error; which instruction, so requested, was as follows: "If the vendor, Morris, made an agreement of sale and delivery, and, in conformity therewith, did sell and deliver cattle to Gregory, the vendee, and by the terms of the agreement made between the parties the vendor was to have and maintain a lien upon the chattels, or cattle, for the balance of the purchase price by keeping the said cattle in the possession of the vendor during the journey from Texas to Wyoming, until the first day of October, A.
7 D. 1875, the vendee, Gregory, after receiving the cattle from Morris, must have first redelivered the said cattle to Morris and placed them in his hands as a pledge before the agreed lien of Morris for balance of purchase price could vest; and, second, if such redelivery was made by Gregory, the vendee, to Morris, the vendor, and thereafter the vendor, Morris, by himself or his agents, by his own fault, carelessness, or negligence, permitted the possession of the said cattle to again pass to Gregory, the vendee, the vendor, Morris, thereby lost his lien and all right of possession and right of property, and possession must thereafter rest and remain in Gregory;" and in not reversing the judgment of said district court because of its refusal to give said instruction to the jury.

8. That the said supreme court erred in sustaining the ruling of
8 the district court before which this cause was tried in overruling the motion of the plaintiff in error to set aside the verdict of the jury in the cause, for the reason that the said verdict was not in due form as required by the law, and not in such form that a judgment could be rendered thereon; and in not reversing the judgment of said district court for said ruling.

9. That said supreme court erred in sustaining the action of said district court in rendering judgment upon the verdict of the jury in the case, the said verdict not being in the form required by law, nor in such form that any lawful judgment could be rendered thereon.

9 10. That said supreme court erred in sustaining the ruling of said district court in overruling the plaintiff in error's motion to set aside the verdict of the jury in this cause and to grant a new trial.

11. That the said supreme court erred in sustaining the action and ruling of the district court before which this case was tried in admitting in evidence to the jury on the trial of this cause, over the objection of the plaintiff in error, the following written instruments, the execution of the same not having been proved:

1st instrument.

STATE OF TEXAS.
County of Travis, ss:

These articles of agreement, made and entered into this day by and between W. A. Morris, on the one part, and A. J. Gregory, of the second part, witnesseth:

1. That the said Morris hereby binds himself to deliver to said
10 Gregory, in Llano County, Texas, between the first and 15th of April, 1873, one thousand head of cattle, more or less, said cattle to be road-branded, and among them there are to be no cows that cannot be driven, or blind in one eye, or hipped; and the receipt of one thousand dollars in gold by said Morris from said Gregory, as part payment for said cattle, is hereby acknowledged.

2. That the said Gregory hereby binds himself to pay to said Morris for so many of said cattle as he receives according to the following scale of prices, to wit:

For beeves, twelve dollars in gold per head; for cows, seven $\frac{50}{100}$ dollars in gold per head; for three-year-olds, eight dollars in gold per head; for two-year-olds, five $\frac{50}{100}$, gold, per head, and for yearlings, three dollars in gold per head; payment for said cattle, except the
$1,000, gold, cash in hand above mentioned, to be made on or
11 before the first day of October, A. D. 1873, to Seth Mabry and E. B. Millett, at Laramie, in Wyoming Territory, with the addition of exchange from the place of payment on New York City, for the benefit of said Morris.

3. The said Morris binds himself to furnish hands to assist said Gregory in his first day's drive after he receives said cattle, and to furnish three hands to assist him on his second day's drive.

4. It is hereby expressly stipulated that the said Morris do have and retain a lien on each and all of the cattle he may deliver to said Gregory, by virtue of this contract, to secure to himself the payment of all the balance of the purchase-money that may be due him for said cattle; and the said Gregory doth hereby fully authorize and empower
12 the said Morris, or whomsoever he may appoint in writing to represent him, in the event that any of the purchase-money for said cattle shall remain due and unpaid on the said 1st October, 1873, to sell, either at public or private sale, all or a sufficient quantity of said cattle to pay the amount of purchase-money then remaining due and all costs of said sale.

This clause is not to be so construed to prevent the said Gregory from selling said cattle before the said purchase-money is paid, provided that the purchaser or purchasers of said cattle shall pay over to said Mabry or Millett the proceeds from said cattle, or a sufficiency thereof to pay off all the purchase-money for said cattle remaining due and unpaid at the time of said sale.

13 5. The said Gregory hereby binds himself to pay the wages and expenses of one man, to be denominated by said Morris, to go along with said cattle as agent of said Morris, and retain possession of said cattle only in the interest of this lien until said purchase money is paid—wages to be paid said man and his expenses for the round trip.

Signed by the parties in triplicate, with scrawls for seals, at Austin, this 26th day of Feb'y, A. D. 1873.

(Signed) W. A. MORRIS. [SEAL.]
A. J. GREGORY. [SEAL.]

Witnesses:
SETH MABRY.
E. B. MELLETT.

2nd instrument.

STATE OF TEXAS,
County Travis, ss:

I, A. J. Gregory, hereby acknowledge that, in accordance with
14 the terms of the annexed contract between myself and W. A. Morris, of date Feb'y 26th, 1873, I have this day received from the said W. A. Morris the following number and kind of cattle at the annexed valuation in gold:

304	head	of	beeves,	valued	@	$3,648	gold.
302	"	"	cows,	"	"	2,265	"
84	"	"	3-y'r-olds,	"	"	672	"
187	"	"	2 " "	"	"	1,028	"
88	"	"	yearlings,	"	"	264	"

Amounting in the aggregate to seven thousand eight hundred and seventy seven $\frac{50}{100}$ dollars in gold, and after deducting the $1,000 gold paid as acknowledged in said contract, and the further sum of $453.62 this day paid said W. A. Morris, leaves me due and owing said Morris on said contract, which I acknowledge to be just, the sum of six thousand four hundred and seventy-three $\frac{88}{100}$ dollars in gold, to secure the payment of which the lien given said Morris in said contract at-
15 taches to said cattle, which are road branded thus: "J."

Witness my signature at Austin, Texas, this 25th day of April, A. D. 1873, in triplicate.

Attest:

A. J. GREGORY. [SEAL.]

THE STATE OF TEXAS,
County of Travis, ss:

Before me, Z. T. Fulmore, a notary public for said county, duly commissioned and qualified, personally appeared A. J. Gregory, to me well known, who acknowledged the execution of the instrument of writing hereto attached, for the uses and purposes and consideration therein stated.

Witness my hand and affix my official seal of office, in the city of Austin, this twenty fifth day of April, A. D. 1873.

[NOTARIAL SEAL.] Z. T. FULMORE,
Notary Public, Travis County, Texas.

16 *3d instrument.*

STATE OF TEXAS,
County of Travis:

By the terms of a contract for the sale of cattle, entered into between W. A. Morris and A. J. Gregory on the 26th of Feb'y, A. D. 1873, it is stipulated that the said Morris is to have a lien on all cattle sold by him to Gregory, to secure the payment for the same, and that said Gregory is to pay the wages of a man, to be denominated by said Morris, to go along with said cattle and retain constructive possession of the same until said Gregory pays all he owes for said cattle to said Morris, or his agent, Mabry or Millett; and it is also stipulated in said contract that the event that the said A. J. Gregory shall not have paid all the purchase money due said Morris on said cattle on or before the 1st day of October, 1873, according to the terms of said contract, then the said W. A. Morris is fully authorized and empowered, or whoever he may appoint in writing to represent him, to sell, either at public or

17 private sale, all or a sufficient quantity of said cattle to pay the amount of purchase-money then remaining due, and all costs of said sale.

Now know ye that I, W. A. Morris, in accordance with the terms of said contract, and by virtue of the power vested in me, thereby reposing special trust and confidence in the capacity and integrity of Charles E. Poteet, have and do hereby nominate, constitute, and appoint the said Charles E. Poteet my true and lawful attorney in fact, to go along with the herd of cattle I have conditionally sold to said Gregory to the northwestern Territories of U. S., and to hold possession of said cattle in the interest of said lien for my benefit until all the purchase-money due me by said Gregory for said cattle is paid. And in the event that any of the purchase-money due me on said cattle by said Gregory shall be due and unpaid on the said 1st October, 1873, then and in that event

18 I hereby fully authorize and empower the said Charles E. Poteet, as fully as I myself am authorized and empowered by said contract, to sell, either at public or private sale, all or a sufficient quantity of said cattle to pay the amount of purchase money then remaining due and unpaid, and all costs of said sale, hereby ratifying and confirming each and all the acts of my said attorney in fact, Charles E. Poteet, which he may legally do by virtue of the powers herein granted and conferred upon him by me.

"Due and" interlined before signing.

Witness my signature at Austin, Texas, this 3 May, 1873.

W. A. MORRIS.

Witness. Attest:

JAMES B. MORRIS.

Z. T. FULMORE.

19 12. That said supreme court erred in affirming the judgment of the district court, before which this cause was tried, and in not reversing the judgment rendered by the said district court.

Wherefore the said plaintiff in error, A. J. Gregory, for the manifest errors hereinbefore set forth and assigned, and appearing in the record herein, prays this court to reverse the judgment of the said supreme court of the Territory of Wyoming, and to restore the said plaintiff in error to all things which he has lost thereby.

M. C. BROWN AND
W. W. CORLETT,
Attorneys for Plaintiff in Error.
C. W. BRAMEL.
Att'y in Sup. Court, U. S.

20 Be it remembered that heretofore, to wit, on the 27th day of July, A. D. 1874, there was filed in the clerk's office of the supreme court of Wyoming Territory a petition in error and transcript, in the words and figures following, to wit:

TERRITORY OF WYOMING, *ss:*

In the supreme court.

A. J. GREGORY, PLAINTIFF IN ERROR,
vs.
W. A. MORRIS AND C. E. POTEET, DEFENDANTS in error.

Petition in error.

The said A. J. Gregory, plaintiff in error, complaining of the said W. A. Morris and C. E. Poteet, defendants in error, alleges that on the 28th

day of March, A. D. 1874, by the consideration and judgment of the district court of the second judicial district court of said Territory, sitting within and for the county of Albany, the said defendants in
21 error recovered a judgment against the said plaintiff in error, in a certain cause then and there depending in said district court, wherein the said A. J. Gregory was plaintiff, and the said W. A. Morris and the said C. E. Poteet were defendants, for the sum of seven thousand four hundred and fifty four and $\frac{00}{100}$ dollars debt, and the costs of the action, taxed at thirty five and $\frac{30}{100}$ dollars.

Plaintiff in error further alleges that said judgment of district court in said action was a final judgment therein, and that there was manifest error in the said judgment, and the proceedings in said action, material in its character, and prejudicial to the legal rights of the plaintiff in error in the following particulars, to wit:

1. That the said district court erred on the trial of said cause in permitting the counsel for defendants in error to propound to the witness, A. J. Gregory, the following question, on cross-examination: "Was the contract of purchase in writing?"

2. That said district court erred on the trial of said cause in
22 permitting the counsel for said defendants in error to propound to the witness, A. J. Gregory, on cross-examination, the following question: "Is this one of the originals of the contract for purchase?"

3. That said district court erred on the trial of said cause in permitting the counsel for said defendants in error to propound to the witness, A. J. Gregory, on cross-examination, the following question: "Did you execute any other papers while in Texas?"

4. That said district court erred on the trial of said cause in permitting the counsel for defendants in error to propound to the witness, A. J. Gregory, on cross-examination, the following question: "Did you see Poteet in Texas?"

5. That said district court erred on the trial of said cause therein in permitting the counsel for said defendants in error to propound to the witness, A. J. Gregory, on cross-examination, the following question: "Did Mr. Poteet come with you and the herd from Texas to the Little Laramie?"

6. That said district court erred on the trial of said cause therein
23 in permitting the counsel for said defendants in error to propound to the witness, A. J. Gregory, the following question, on cross-examination: "Did you ask the permission of Mr. Poteet to dispose of or sell any cattle while on the road?"

7. That said district court erred on the trial of said cause therein in permitting the counsel for said defendants in error to propound to the witness, A. J. Gregory, on cross-examination, the following question: "Did you ask permission of Poteet to sell or trade cattle at Fort Hays?"

8. That the said district court erred on the trial of said cause in permitting the counsel for defendants in error to propound to the witness, Ora Haley, upon his cross-examination, the following question: "Did you have any interest in these cattle *at* [when?] this suit was commenced, and, if so, what was it?"

9. That the said district court erred in permitting counsel for defendants in error to propound to the witness, Ora Haley, on his cross-examination, the following question: "Did you write these letters?"

24 10. Because said district court erred in overruling said plaintiff's objection to granting leave to the defendants to file an amended answer.

11. Because said district court erred in overruling the said plaintiff's objection to the admission in evidence by defendants of a certain written contract for the sale and delivery of cattle, signed by said plaintiff and said defendant Morris on the 26th day of February, A. D. 1873.

12. Because the said district court erred on the trial of said cause in overruling the objection of said plaintiff to the introduction in evidence, on the trial of said cause, by defendants in error, of a certain instrument in writing, purporting to be signed by one A. J. Gregory, and purporting to be signed and sealed the 25th day of April, 1873.

13. That the said district court erred on the trial of said cause in overruling the objection of said plaintiff to the introduction in evidence therein, by said defendants, of a certain other instrument in writing, purporting to be signed by one W. A. Morris, at Austin, Texas, on 3rd May, 1873.

25 14. That said district court erred in giving to the jury certain instructions, numbered and designated 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, in the record herein.

15. The said district court erred in refusing to give to the jury on the trial of said cause certain instructions as requested by the plaintiff, and numbered and designated in the record herein 1st, 2, 3, 4th, 5, 6th, 7.

16. Because the said district court, on the trial of said cause, erred in giving to the jury, when they retired to deliberate upon their verdict, a portion of the evidence in the case and the statutes of the Territory, over the objection of said plaintiff.

17. That the said district court erred in overruling the plaintiff's motion for a new trial, and to vacate the verdict of the jury, and in ordering judgment for the defendants in error on the said verdict.

18. Because said district court erred in giving judgment for defendants in error against the plaintiff in error in this action.

19. Because said district court erred on the trial of this cause
26 in instructing the jury "that the written contract between Morris & Gregory, in connection with the bill of sale, receipt, and power of attorney, necessarily explains and defines the rights and interests of the parties to this action in the property in question."

20. That said district court erred on the trial of this cause in instructing the jury "that a contract to pay in gold was valid, and payment in kind should be enforced; that the jury should return their verdict in dollars and cents, and compute the difference between the value of gold and currency."

21. That said district court erred on the trial of this cause in giving certain other instructions to the jury, asked for and put in writing by defendants' attorney, numbered 3, 4, & 5, in the record herein.

22. That the said district court erred on the trial of this cause therein in refusing to instruct the jury as requested by plaintiff's attorney in his written instructions requested, and numbered 2, 3, 4, part of 5, 7, 8, & 9, in the record herein.

27 23. That the said district court erred in rendering judgment upon a verdict in this cause not in due form, as required by law, and in rendering judgment upon a verdict upon which no judgment could be awfully rendered.

To all of which alleged errors of said district court, occurring on the trial of said cause therein, the said plaintiff in error objected, and excepted at the time each alleged error occurred respectively, and the same were in due time and in due form reduced to writing and signed by the presiding judge of said district court, and incorporated in a bill of exceptions in said cause, and made a part of the record therein.

Said plaintiff in error further alleges that a true and perfect transcript of the proceedings, containing the final judgment in the said case in said district court, is attached hereto and is marked "A," and is filed herewith, to which plaintiff in error refers the court to show more fully and at length the alleged errors herein complained of.

Wherefore said plaintiff in error prays that the judgment of
28 said district court may be reversed, and a venire de novo awarded.

A. J. GREGORY,
Plaintiff in Error,
By W. W. CORLETT & M. C. BROWN,
His Attorneys.

JULY 24TH, 1874.

Leave given to file petition in error.

J. W. FISHER,
C. J. Wyoming Territory.

29 A.

Bill of exceptions.

TERRITORY OF WYOMING,
County of Albany, ss:

In the district court, second judicial district.

A. J. GREGORY, PLAINTIFF,
vs.
W. A. MORRIS AND C. E. POTEET, DEFENDANT.

Be it remembered that on the trial of this cause the following proceedings were had, viz:

The plaintiff filed his petition, in the words and figures following, to wit:

(Here insert the plaintiff's petition, see page 45.)

And thereupon the defendant filed his answer, in words and figures following, to wit:

(Here insert the defendant's answer, see page 49.)

And thereafter, at a regular term of this said court, to wit, the February term, A. D. 1874, this cause was called for trial, and the plaintiff and defendants, by their attorneys, announced themselves ready
30 for trial, and on the 16th day of March, A. D. 1874, the court ordered that the trial of this action be proceeded with, and thereupon the following jury was empanneled and sworn to well and truly try the said cause, to wit: L. Miller, A. S. Blackburn, J. H. Triggs, F. A. Blake, W'm Burns, N. K. Boswell, John J. Fein, C. H. Bussard, Paul Tuhr, John A. Fischer, John A. Wright, George Cardwell.

The plaintiff's attorney thereupon made a statement of plaintiff's case to the said jury, and then proceeded to introduce evidence in support of the plaintiff's claim, as set forth in plaintiff's petition, and in support of the issues on the part of the said plaintiff presented thereby, as follows, to wit:

Testimony of A. J. Gregory.

A. J. GREGORY, one of the witnesses, having been first duly sworn as by law required, testified substantially as follows, to wit:

I am the plaintiff in this case and know the defendants.

I was, on the 4th day of October, A. D. 1873, the owner of 805 head

of Texas cattle, road-branded "J," the same cattle sued for in
31 this action, and described in the plaintiff's petition. I was at that time the unqualified owner of said cattle, and entitled to the immediate possession of the same.

I bought the cattle in the State of Texas of W. A. Morris, one of the defendants, in the month of April, 1873.

The cattle were delivered to me by M'r Morris about the first of April, 1873. I drove the cattle from Texas. After having brought the same to the Little Laramie River, in Albany County, Wyoming Territory, and arrived there about the first of September, 1873. I had the cattle wholly in my possession during all of said drive from Texas to Wyoming undisputed, and from the time the cattle were delivered to me by Morris up to the 4th day of October, 1873.

On the 4th day of October, 1873, the said cattle were taken from my possession by C. E. Poteet, one of the defendants, in Albany County, Wyoming Territory.

While eating breakfast in the morning, Poteet, with two men em-
ployed by him for that purpose, went to the field where the cattle
32 were being kept and commenced driving them away. I saw this, and went out and forbid him driving the cattle, and demanded of him the return of the cattle to me, and he refused. He (Poteet) said that the cattle were not mine, and he should keep them and drive them away.

I had some further controversy with Poteet at that time, and Poteet displayed his six-shooter, and said he should keep the cattle, and if I thought I had any right to them I could take such steps as I might think best. He then drove the cattle away.

I had been the owner of these cattle, and in the sole, exclusive, and undisputed possession of them from about the first of April up to this time.

I immediately took steps to take those cattle by suit in replevin, and there were delivered to me of these cattle, on the writ of replevin, by the sheriff, seven hundred ninety-one head of cattle. These were the same cattle taken from me by the defendant Poteet, and were all the cattle found in his possession by the sheriff, as I understood it.
33 The cattle were worth about eleven thousand dollars. The cattle were damaged by being driven away by the defendant and while in his possession, about $300.00. That cattle had been driven from Texas and put on the range, and were tender-footed.

In driving them away to Alsop's ranch they were driven fast and over a hard, stony road, and quite a number of them were badly crippled. One cow was injured in the back and died. She was worth $13.00. The cattle being driven in this way would not winter as well as they otherwise would.

Cross-examination:

The cattle had been driven probably 1,000 miles from Texas to Wyoming. Poteet, the defendant, started with the cattle from Halley's ranch 9 or 10 o'clock in forenoon.

Two or three animals, in particular, I noticed had been badly crippled by being driven away. One red cow, road-branded "J," died.

Question by defendant's attorney. Was the contract of purchase in in writing?

34 (Question objected to by plaintiff's attorney, on the ground that it is improper cross-examination, leading, and irrelevant, and not

material to the issues presented by the pleadings. Objection overruled by the court and exception noted.)

Answer of witness. There was a contract for purchase of these cattle, in writing.

Attorney for defendant here presents a written document to the witness and interrogates him as follows:

Question. Is this one of the originals of the contract for purchase?

(Objected to by plaintiff's attorney for same reasons, i. e., improper cross-examination, irrelevant, &c. Objection overruled, and witness ordered to answer. Exception noted.)

Answer of witness. This may be the paper. That looks like my signature.

Question by att'y for defendant. Did you execute any other papers while in Texas?

35 (Objected to as before by att'y for pl'ff; ground, not proper cross-examination. Objection overruled by court. Exception by counsel to ruling of court noted.)

Answer. I did.

Question by att'y for defendant. Did you see Poteet in Texas?

(Objected to as improper cross-examination. Objection overruled and exception noted.)

Answer. I did.

Question by att'y for defendant. Did M'r Poteete come with you and the herd from Texas to the Little Laramie?

(Objected to by att'y for pl'ff as improper cross-examination. Objection overruled & exception noted.)

Answer. After we had started and been on the road several days, he overtook me, and came on through.

Question by defendant's att'y. Did you ask the permission of M'r Poteet to dispose of or sell any cattle while on the road?

(Objected to by att'y for pl'ff on the ground of improper cross-
36 examination. Objection overruled. Exception noted.)

Answer. Did not ask permission to sell cattle.

Question by defendant's att'y. Did you ask permission of Poteet to sell or trade cattle at Fort Hays?

(Objected to as improper cross-examination. Objection overruled, and exception to ruling of court by att'y for pl'ff.)

Answer. No; I never asked Poteet's permission to sell anything.

Re examination:

Question by att'y for plaintiff. How long had you been on the road with the herd, and how long had you been in possession when M'r Poteet overtook you?

Answer. Had been on the road from Austin seven days, and in possession of the cattle ten days.

Testimony of Willis E. Johnson.

The next witness who testified on the part of the plaintiff was
37 WILLIS E. JOHNSON, and who, being first duly sworn as by law required, testified substantially as follows, to wit:

I know the parties to this suit, plaintiff and defendants, and I know the cattle in controversy.

I have known the cattle since March 14th, A. D. 1873. I was with the cattle when they were delivered to M'r Gregory, and road-branded

"J." I was in Gregory's employ, and assisted in road-branding the cattle.

I was with the cattle from the 14th of March—in the employ of M'r Gregory—to October, when the cattle were taken by Poteet. I assisted in driving the cattle from Texas to the Little Laramie, in Albany County, W. T., when they were taken and driven away by Poteet. This was about the 4th day of October.

During the journey from Texas to Wyoming there were several men besides myself that were employed in driving the herd; do not now remember their names; some were discharged on the road.

We all received our orders from M'r Gregory. M'r Gregory hired and paid all the men.

38 Do not know of any person except M'r Gregory who exercised any authority over the cattle or herd from the time we left Texas up to the 4th of October.

M'r Gregory had the undisputed and exclusive control and possession of said cattle all the time I was with the herd until they were driven away by Poteet, on the 4th of October.

Poteet drove them from Haley's ranch, on the Little Laramie, to Alsop's ranch, on the Big Laramie, in about 5 hours; it is about 20 miles.

The expense of getting the cattle back was not less than $100.00. The cattle were injured by being driven away by Poteet more than $500.00.

M'r Poteet came with herd from Texas. He joined us after we had been on the road seven or eight days. He came along with the herd the same as any other hired man.

Cross examined by att'y for def'ts:

Saw Poteet in Texas, at the capital and west of there. He was not in the county when we got the cattle, that I saw. I saw him at
39 the time when the last cattle were driven in, but not with the cattle. Poteet left Haley's ranch with the cattle about 11 o'clock in the forenoon.

Testimony of Ora Haley.

ORA HALEY, being duly sworn as by law required, was then placed upon the stand as a witness for the plaintiff in this action, and testified substantially as follows, to wit:

I know the plaintiff, Gregory, and know one of the defendant, sM'r Poteet.

I have known the cattle in controversy since the 10th day of September last.

They were kept by M'r Gregory at my ranch, on the Little Laramie River, in this county, from that time up to the 4th October, 1873. At At that time the cattle were driven away by the defendant Poteet.

M'r Gregory was in the sole and exclusive possession of the cattle from the first that I knew of them, on the 10th of September, up to the time they were driven away by M'r Poteet, Oct. 4th.

The cattle were damaged and injured by being driven from the range by Poteet not less than $500.00.

It cost about $100 to get the cattle back on the range again.
40 There was one cow died, from being injured, before the cattle were got back to the range.

Cross-examined by def'ts' att'y:

Question by defendants' att'y. Did you have any interest in these cattle at this suit was commenced, and, if so, what was it?

(Question objected to by attorney for pl'ff on the ground it is not proper cross-examination. Objection overruled, and exception to ruling of the court taken by pl'ff's attorney.)

Answer. I had no ownership, no right of possession, and no authority over the cattle. I had authority from Gregory to sell the cattle, or a part of them, if I could find a buyer.

Question. Did you write these letters?

(Objected as improper cross-examination. Overruled. Exception noted.)

Answer. I did write them both.

Testimony of Capt. Manchester.

Captain Manchester was the next witness offered on the part
41 of the plaintiff, and, being first duly sworn, testified substantially as follows, to wit:

I know the plaintiff, and the defendant Poteet. M'r Poteet took the cattle in controversy away from Haley's ranch, on the Little Laramie River, about the 4th of October, A. D. 1873.

Gregory made a demand on Poteet for the cattle, and Poteet refused to deliver them to Gregory.

Here the plaintiff rested his case.

Hereupon the defendants stated their case to the jury, and offered in evidence in support of the issues presented in this case by the pleadings on the part of the defense certain documentary evidence, said to be a contract for the sale of these said cattle, and show a lien on said cattle by the defendants, and the defendants' right of possession by reason their special property in said cattle, which said written contract bears date Feb'y 26th, A. D. 1873.

To the introduction of this documentary evidence the plaintiff, by his att'y, then and there objected, because the same was
42 irrelevant and not material to the issues presented by the pleadings on file in this action, which said objection was sustained by the court.

Exception to order of court.

Whereupon the defendant asked leave of the court to file an amended answer, and the plaintiff, by his attorney, there and then objected to the amendment proposed, because the same set out a special interest or property in the said cattle, and thereby presented new matter and a new issue in the case; and the court overruled the objection and ordered that the amended answer be filed instanter; to which said order and ruling of the court the plaintiff then and there, by his attorney, excepted.

Thereupon the defendant, by his attorney, in support of the issue presented by his amended answer, offered in evidence a certain written contract for the sale and delivery of cattle, signed by plaintiff Gregory and defendant Morris, on the 26th of February, A. D. 1873, for the purpose of showing the special property of the defendant Morris in the
43 said cattle, and thereby his right of possession. To the introduction of which said evidence the plaintiff then and there objected, and the court overruled the objection; and the plaintiff then and there excepted to the said ruling of the court; and thereupon the said written contract was by the defendants offered in evidence and read to the jury over the objection of the plaintiff, and in the words and figures following, to wit:

Written contract between W. A. Morris & A. J. Gregory.

THE STATE OF TEXAS,
County of Travis:

These articles of agreement, made and entered into this day by and between W. A. Morris, on the one part, and A. J. Gregory, of the second part, witnesseth:

1. That the said Morris hereby binds himself to deliver to said Gregory, in Llano County, Texas, between the first and 15th of April, 1873, one thousand head of cattle, more or less, said cattle to be road-branded, and among them are to be no cows that cannot be driven, or blind in one eye, or hipped; and the receipt of one thousand dol-
44 lars in gold by said Morris from said Gregory, as part payment for said cattle, is hereby acknowledged.

2. That the said Gregory hereby binds himself to pay to said Morris for so many of said cattle as he receives, according to the following scale of prices, to wit:

For beeves, twelve dollars in gold per head; for cows, seven $\frac{50}{100}$ dollars in gold per head; for three-year olds, eight dollars in gold per head; for two-year-olds, five $\frac{50}{100}$ in gold per head; and for yearlings, three dollars in gold per head; payment for said cattle, except the $1,000 gold cash in hand above mentioned, to be made on or before the 1st day of October, A. D. 1873, to Seth Mabany or E. B. Millett, at Laramie, in Wyoming Territory, with the addition of exchange from the place of payment on New York City for the benefit of said Morris.

3. The said Morris binds himself to furnish hands to assist said Gregory in his first day's drive after he receives said cattle, and
45 to furnish three hands to assist him on his second day's drive.

4. It is herein expressly stipulated that the said Morris do have and retain a lien on each and all of the cattle he may deliver to said Gregory by virtue of this contract, to secure to himself the payment of all the balance of the purchase-money that may be due him for said cattle, and the said Gregory doth hereby fully authorize and empower the said Morris, or whomsoever he may appoint in writing to represent him, in the event that any of the purchase-money for said cattle shall remain due and unpaid on the said 1st October, 1873, to sell, either at public or private sale, all or a sufficient quantity of said cattle to pay the amount of purchase-money thus remaining due, and all costs of said sale.

This clause is not to be so construed to prevent the said Gregory from selling said cattle before the said purchase money is paid, provided that the purchaser or purchasers of said cattle shall pay over to said Mabry or Millit the proceeds from said cattle, or a sufficiency thereof to
46 pay off all the purchase-money for said cattle remaining due and unpaid at the time of said sale.

5. The said Gregory hereby binds himself to pay the wages and expenses of one man, to be denominated by said Morris, to go along with said cattle, as agent of said Morris, and retain possession of said cattle only in the interests of this lien, until said purchase-money is paid; wages to be paid said man and his expenses for the round trip.

Signed by the parties in triplicate, with scrawls for seals, at Austin, this 26th day of Feb'y, A. D. 1873.

W. A. MORRIS. [SEAL.]
A. J. GREGORY. [SEAL.]

Witnesses:
SETH MABRY,
E. B. MILLETT.

47 And the defendant then offered the following written instrument in evidence, which was permitted by the court to be read to the jury as evidence in this case over the objection of plaintiff; to which said ruling of the court the plaintiff then and there excepted.

The said written evidence is in the words and figures following, to wit:

Written instrument given in evidence, signed by A. J. Gregory.

STATE OF TEXAS,
County of Travis:

I, A. J. Gregory, hereby acknowledge that in accordance with the terms of the annexed contract between myself and W. A. Morris, of date Feb'y 26th, 1873, I have this day received from the said W. A. Morris the following number and kind of cattle, at the annexed valuation, in gold, to wit:

304	head of beeves,	valued	@	$3,648	gold.
302	"	" cows,	"	"	2,265	"
84	"	" 3 y'r-olds,	"	"	672	"
187	"	" 2 "	"	"	1,028	"
88	"	" yearlings,	"	"	264	"

48 Amounting in the aggregate to seven thousand eight hundred & seventy-seven $\frac{50}{100}$ dollars in gold, and after deducting the $1,000.00 gold paid as acknowledged in said contract, and the further sum of $453.62, this day paid said W. A. Morris, leaves me due and owing said Morris on said contract, which I acknowledge to be just, the sum of six thousand four hundred and twenty-three $\frac{88}{100}$ dollars in gold; to secure the payment of which the lien given said Morris in said contract attaches to said cattle, which are road-branded thus: "J."

Witness my signature, at Austin, Texas, this 25th day of April, A. D. 1873, in triplicate.

Attest:

A. J. GREGORY. [SEAL.]

THE STATE OF TEXAS,
County of Travis:

Before me, Z. T. Fulmore, a notary public for said county, duly commissioned and qualified, personally appeared A. J. Gregory, to me well known, who acknowledged the execution of the instrument of writing hereto attached, for the use & purposes and considerations therein stated.

49 Witness my hand and affix my official seal of office, in the city of Austin, this the twenty-fifth day of April, A. D. 1873.

[NOTARIAL SEAL.] Z. T. FULMORE,
Notary Public, Travis County, Texas.

And the defendant then offered the following other instrument in evidence, which was permitted by the court to be read to the jury as evidence in this case over the objection of plaintiff; to which said ruling of the court the plaintiff then and there excepted.

The said written evidence is in the words and figures following, to wit:

Written contract, signed by W. A. Morris.

STATE OF TEXAS,
County of Travis:

By the terms of a contract for the sale of cattle, entered into between W. A. Morris and A. J. Gregory on the 26th Feb'y, A. D. 1873, it is stip-

ulated that the said Morris is to have a lien on all cattle sold by him to Gregory, to secure the payment for the same, and that said Gregory
50 is to pay the wages of a man to be denominated by said Morris to go along with said cattle and retain constructive possession of the same until said Gregory pays *pays* all he owes for said cattle to said Morris, or his agent Mabry or Millett; and it is also stipulated in said contract that in the event the said A. J. Gregory shall not have paid all the purchase-money due said Morris on said cattle on or before the 1st day of October, 1873, according to the terms of said contract, then the said W. A. Morris is fully authorized and empowered, or whomever he may appoint in writing to represent him, to sell, either at public or private sale, all or a sufficient quantity of said cattle to pay the amount of purchase-money thus remaining due, and all costs of said sale.

Now, know ye that I, W. A. Morris, in accordance with the terms of said contract, and by virtue of the power vested in me thereby, reposing special trust and confidence in the capacity and integrity of Charles E. Poteet, have and do hereby nominate, constitute, and appoint
51 the said Charles E. Poteet my true and lawful attorney in fact, to go along with the herd of cattle I have conditionally sold said Gregory, to the Northwestern Territories of U. S., and to hold possession of said cattle in the interest of said lien, for my benefit, until all the purchase-money due me by said Gregory for said cattle is paid; and in the event that any of the purchase-money due me on said cattle by said Gregory shall be due and unpaid on the said 1st October, 1873, then and in that event I hereby fully authorize and empower the said Charles E. Poteet, as fully as I myself am authorized and empowered by said contract, to sell, either at public or private sale, all or a sufficient quantity of said cattle to pay the amount of purchase-money thus remaining due (due &) and unpaid, and all costs of said sale; hereby ratifying and confirming each and all the acts of my said attorney in fact, Charles E. Poteet, which he may legally *due* by virtue of the power herein granted and conferred upon him by me.

"Due &" interlined before signing.

Witness my signature, at Austin, Texas, this 3d May, 1873.

W. A. MORRIS.

Witness. Attest:

JAMES B. MORRIS.

Z. T. FULMORE.

52 *Testimony of C. E. Poteet.*

The defendants then put C. E. Poteet, one of the defendants, on the witness-stand, as a witness on behalf of the defendants in this action; and, being duly sworn, testified substantially as follows, to wit:

I am acquainted with the plaintiff, A. J. Gregory, and am one of the defendants, and I know the defendant W. A. Morris. I am acquainted with the cattle in controversy, and assisted in gathering a portion of them in Texas. I was sent up by M'r Morris to assist in gathering the cattle. David Ligan held a power of attorney from M'r Morris similar to the one I have, to come along with Gregory. The cattle were driven from Llano & Burnett Counties, two or three days' drive from Austin, where the receipt for the cattle was executed by Gregory.

M'r Ligan had requested to be relieved, and I was appointed in his place. I was detained by sickness in Austin, and did not get up in time. I followed the herd, and overtook it about 7 days after they

53 had started from Austin. I asked M'r Gregory to furnish me a horse. He first said that he had no horses for me, and afterwards furnished me one, my saying to him I must have one. I then came along with the herd from there through to Wyoming.

At Fort Hays M'r Gregory asked my permission to sell some of the cattle, or trade them for a wagon with a man by the name of Axerart. I declined giving permission, and afterward bought a wagon for Gregory. I authorized M'r Gregory to sell some crippled cattle at one time when at Fort Hays. M'r Gregory and I went down into a hollow and there read my papers. I showed M'r Gregory my power of attorney. This was the first time he had seen it, but he knew I had it. It had been talked of in D'r Morris' office, in M'r Gregory's presence, as the one that had been appointed by D'r Morris to come along with the herd.

Gregory never objected to my coming, or my authority over the cattle.

We arrived at M'r Haley's ranch, on the Little Laramie, about the 1st or the first days of September. Mabery & Millett came to Little
54 Laramie the last days of September. They took M'r Haley out and talked to him about the payment of the balance of the purchase-money, and also talked with M'r Gregory about the same thing. They told Haley and Gregory they should want their money the next day. They met in town the next day. I am not positive about the date, but I knew I went into town on the first of the month.

I saw M'r Haley the first night after we arrived with the cattle at his ranch on the Little Laramie. He said he was interested in the cattle, and I showed him my power of attorney.

I remained with the cattle all the time up to Oct. 4th, and I had sole and exclusive possession and control of the cattle, as I understood it, so far as the sale of them was concerned, from the time I overtook the herd in Texas up to the first of October. After I went into town on the 1st October, an attempt was made by Haley & Gregory to raise money to pay balance of purchase-price of cattle.

On the 2nd day of October I made a proposition to Gregory to take $2,000 in cash and the balance in 90 days; this was my ultimatum. They did not pay the money.

55 I notified M'r Gregory and Haley both, the next day, that I would take the cattle away the next day, and I drove the cattle from M'r Haley's to Alsop's ranch, on the Big Laramie, on the 4th day of October, for the purpose of making a sale of them. The expense of driving the cattle back from Alsop's to Haley's would be about $7.50.

While I was stopping at M'r Haley's ranch M'r Haley claimed ownership in the cattle in a conversation I had with him. He said M'r Gregory had gone down there to buy those cattle; had taken with him $1,000 of his own money and $2,800 of his, (Haley's.) At different times when on the road I had conversations with Gregory, and he said that Haley was a partner of his in these cattle.

In a conversation with M'r Haley while at his ranch, he stated to me that he would not have money enough to pay the balance on these cattle when due, and asked if I would object to his selling a part of them. I told him that I would not, so that the money was paid to me. There was no other contract for cattle that I know of except the one in
56 writing.

I heard D'r Morris state to M'r Gregory that I, Charles E. Poteet, should go along with him, (Gregory,) to hold possession of the cattle for D'r Morris. This conversation occurred in D'r Morris' office, Austin, Texas, the latter part of April, 1873.

Cross examined:

M'r Gregory did not say to me, at the time I overtook the herd in Texas, when 7 days out, that he had no horse for me; he said that he was short of horses. I said he must get me one. He did not say to me in that conversation if I wanted to go along and work with the herd I could have a horse. In my conversation with Gregory at Fort Hays the idea conveyed to me by Gregory was to ask my permission to sell. We read the contract and power of attorney at that time together.

Here the defendants rested their case, and the plaintiff called witnesses in rebuttal.

Testimony of A. J. Gregory, in rebuttal.

A. J. Gregory testified substantially as follows, to wit:

57 At the time I had a conversation with Morris, in his office, in Texas, in the presence of M'r Poteet, when Morris told me he had appointed Poteet to come along with me in his interest, I said to M'r Morris at that time that I would not permit Poteet to come along; that I did not want him with the herd. M'r Poteet was in the room and could easily have heard this conversation.

I never asked permission of M'r Poteet, at Fort Hays, or at any other place, or any time or place, to sell or dispose of any of these cattle.

M'r Poteet never claimed to have any right of possession of these cattle.

Testimony of M'r Haley, in rebuttal.

M'r Haley, being recalled in rebuttal, testified substantially as follows, to wit:

I never asked permission of Poteet to sell any of these cattle, and never asked his permission to do anything.

I, at one time, in behalf of M'r Gregory, offered to pay Millett & Mabry the balance of the purchase-price of these cattle in payments as follows: $2,000 cash, and the balance in National Bank of Wyoming checks on New York, payable in 90 and 120 days.

58 I never told Poteet that I was a partner of Gregory's, and never told him at any time I was an owner of the cattle or in the cattle.

Here plaintiff offered in evidence a bill of sale from Morris to Gregery, which was in the words and figures following, to wit:

Bill of sale from W. A. Morris to A. J. Gregory.

STATE OF TEXAS,
County of Travis:

I, W. A. Morris, in accordance with the terms of a contract between myself and A. J. Gregory, of date Feb'y 26th, 1873, *I* hereby assign and transfer to said A. J. Gregory all my right, title, and interest in and to the cattle described in the annexed bill of sale, subject to my lien, and all conditions stipulated in said contract between myself and said A. J. Gregory.

Witness my signature, at Austin, Texas, this 25th April, 1873.

W. A. MORRIS.

Here follows the acknowledgment of signature, taken before Z. T. Fulmore, notary public, Austin, Texas, April 25th, 1873.

59 And the bill of sale referred to in the above bill of sale sets forth the different brands on the cattle and the general road-brand, "J," which said road-brand is on all the cattle.

Here the plaintiff closed his case and proceeded to the jury, after having requested certain instructions from the court, which were reduced to writing and submitted to the court before the commencement of the argument of the case to the jury. After the arguments to the jury were concluded, the court instructed the jury as follows, viz:

Instructions to the jury by the court.

1st. That the written contract between Morris & Gregory in connection with the bill of sale, the receipt, and the power of attorney to Poteet, necessarily explain and define the rights and interests of the parties to this action in the property in question.

2d. That by and under those papers the defendants had a legal right to take possession of the cattle in question on or after the 1st day of October last, and retain such possession for the purpose of selling them according to the terms of said contract.

60 3rd. That if the jury find that Poteet, in pursuance of his power of attorney, took possession of said cattle and removed them to Alsop's ranch, for the purpose of selling them according to the terms of said contract, then they must find the right of possession in the defendant at the commencement of this action, and must assess such damages for the defendants as are "just and proper."

4th. That the pleadings in this case put in issue only the right of possession at the time of the service of the writ of replevin, and you are instructed that the right of the plaintiff in these cattle at that time was only a right of redemption as a mortgagor after condition broken, and that he had no right to the possession of the cattle and no right to take them by replevin or otherwise from these defendants, or either of them, until he had paid or tendered the amount due on them under the contract.

5th. That the defendants had the right under the contract to
61 take and hold possession of the cattle, all of them, until sold or redeemed, and you will so find unless there is evidence before you to convince you that the defendants have released or in some way lost that right.

6th. The jury must compute the damages and return their verdict on that computation in dollars and cents; and if the jury find the contract on the part of the plaintiff was to pay a certain sum of money in gold, they will compute the difference between gold and currency, and render their verdict in dollars and cents in currency.

7th. If the jury find that by the terms of the written contract, which must govern in this case, that the defendants, on the 1st day of October, 1873, had a right to sell these cattle, the right to sell necessarily carries with it the right of possession.

To all of which said instructions the plaintiff, by counsel, there and then excepted.

Instructions requested by plaintiff & refused by the court.

And the following instructions were requested by the plaintiff,
62 reduced to writing, and were refused by the court, to wit:

1st. A vendor of chattels, at common law, has a lien upon the chattels sold so long as they remain in his possession, and no longer.

By the sale the general property vests in the vendee, but a special property remains in the vendor, so long as he retains possession. A delivery to the vendee divests the lien, and, after delivery, no lien special, property, or right of possession vests in the vendor. Absolute title, as between the parties, then vests in the vendee.

2. An agreement of sale and delivery of chattels, with provision of lien by possession, places the property in precisely the same condition, as to the rights of the vendor; it would be in under a vendor's lien at common law; the right of lien depends wholly upon possession.

3. If the vendor Morris made an agreement of sale and deliv-
63 ery, and, in conformity therewith, did sell and deliver cattle to Gregory, the vendee, and, by the terms of the agreement made between the parties the vendor was to have and maintain a lien upon the chattels or cattle for the balance of the purchase-price by keeping the said cattle in the possession of the vendor during the journey from Texas to Wyoming until the 1st day of October, A. D. 1873, the vendee Gregory, after receiving the cattle from Morris, must have first redelivered the said cattle to Morris and placed them in his hand as a "pledge" before the agreed lien of Morris for balance of purchase price could vest.

And, second, if such redelivery was made by Gregory, the vendee, to Morris, the vendor, and thereafter the vendor, Morris, by himself or his agents, by his own fault, carelessness, or negligence, permitted the possession of the said cattle to again pass to Gregory, the vendee, the the vendor, Morris, thereby lost his lien, and all right of possession and right of property and possession must thereafter rest and remain in Gregory.

64 4th. The written agreement between Morris and Gregory, to entitle it to consideration in this action, must be shown to have been properly executed by the parties hereto, and the party claiming right by or under the terms of the same must first show that he has performed, or was ready, willing, and able to perform, all the conditions in said agreement contained to be by him performed under and by the terms thereof; and one of the conditions of said agreement to be performed by the said Morris was the sale of and delivery of the said cattle to the said Gregory on a day certain.

Was the delivery made? If yes, then title, full and complete, vested in Gregory. Was a redelivery thereafter made by Gregory to Morris in such a manner that the lien under the contract could and did vest in Morris? If yes, then did Morris continue in possession and have the full and entire control of the property until the 1st day of October, and until the cattle were driven away from Haley's ranch by Poteet, and thereby his lien maintained? If yes, then right of possession
65 was in defendants Morris and Poteet; and, if no, then title in right of possession was in the plaintiff, Gregory, at the commencement of this action.

5. If the jury believe from the evidence that the plaintiff, Gregory, after having bought the property in question and after having taken the same into his possession, redelivered it to the defendants, or either of them, and that the defendants retained the possession of the said property from thence during the journey from Texas to Wyoming, and up to the date of the commencement of this action, and thereby obtained and continued their lien in force, then the defendants were entitled to the possession of the cattle at the commencement of this action, the detention was not wrongful, and the jury must find for the defendants.

The right of possession in this case, if in the defendants, is a special property; and if the jury find for the defendants, they must find the

value of the defendants' interest, if any, in the said property, and
66 the defendants' measure of damages will be the value of his interest in the property, or the balance of the purchase-price remaining unpaid.

6th. The jury must compute the damages and return their verdict on that computation in dollars and cents. No agreement or contract to pay a certain number of dollars in gold can be enforced. The national currency is by law a legal tender at its face-value for all debts and demands, public and private, except duties on imports and interest on the public debt.

7. If the jury believe that the defendant Morris, or his agent, did hold possession of the cattle during all the journey from Texas to Wyoming, and all the time from the date of the delivery of said cattle by Morris in Texas to the plaintiff, Gregory, up to the date of the taking of said cattle by the said Poteet on the Little Laramie, and in that way maintained his lien on said cattle; and if the jury believe that on
67 or about the 1st October, 1873, a tender was made of the balance of the purchase-price of said cattle, then the lien, if any ever existed, was extinguished by the tender, and right of possession of the property in question was thereafter in the plaintiff.

Said instructions having been refused by the court, the plaintiff there and then excepted.

Instructions given to jury by the court without objection & by consent.

And the court gave certain other instructions to the jury, to which no exception was taken by counsel, one of which said instructions, being reduced to writing, was given to the jury by consent, and was in the words following, to wit:

There being no question of title to these cattle put in issue by the pleadings, but of possession only, if you find for the defendants you will find "that they had the right of possession," and will assess such damages as they have sustained by reason of being deprived of that possession and the opportunity of selling the cattle according to the contract.

68 *Bill of exceptions.—Exception by plaintiff.*

And now the jury being about to retire, the court placed in the hands of the jury, for the purpose of being taken to their room on retiring, the contract, receipt, and bill of sale, (copies of which are hereinbefore inserted,) and the statutes of the Territory.

To which said act on the part of the court the plaintiff objected and protested as an improper *and improper* conduct on the part of the court; which said objection was overruled by the court, and the said contract, receipt, and bill of sale offered in evidence in this case, and the statutes, were taken *were taken* by the jury to their room on retiring for the consideration of the issues involved in this case.

To all of which actings, doings, and rulings the plaintiff, by his counsel, then and there excepted.

And thereafter the jury returned their verdict in open court; which said verdict was in the words and figures following, to wit:

(Here insert verdict. See page 51.)

69 And thereafter the plaintiff filed his motion to vacate the verdict and grant a new trial, and, in support of said motion, filed

therewith as a part thereof an affidavit; which said motion and affidavit is in the words and figures following, to wit:

(Here insert motion to vacate judgment, and affidavit in support thereof, filed March 20th, 1874. See pages 53 to 60, incl.)

And the court, being fully advised in the premises, after argument of counsel on both sides, overruled the motion, and ordered a judgment on the verdict in favor of the defendants, and against the plaintiff, for the sum of $7,454.90, (seven thousand four hundred fifty-four & $\frac{90}{100}$ dollars.)

The said judgment being ordered by the court over the objection of the plaintiff, based on the ground that the said verdict was in form illegal and void, and that no judgment could properly be entered thereon; which said objection was overruled by the court, and
70 plaintiff thereto excepted.

To each and all of the said rulings and orders of the said court on and during the trial of this action, and the judgment of the court, at the times they were made, the plaintiff then and there excepted.

Wherefore the plaintiff's bill of exceptions is signed in open court this twenty-ninth day of April, A. D. 1874, and made a part of the record in this case.

E. A. THOMAS,
Associate Justice of the Supreme Court and Presiding Judge.

(Endorsed on back as follows:) A. J. Gregory & W. A. Morris et al. Bill of exceptions. Filed April 29th, 1874. J. W. Meldrum, clerk.

71 TERRITORY OF WYOMING,
County of Albany, ss:

In the district court, first judicial district, Albany County, W. T.

A. J. GREGORY, PLAINTIFF,
vs.
W. A. MORRIS AND C. E. POTEATE, AGENT of W. A. Morris, defendants.

Petition in replevin.

The said A. J. Gregory, plaintiff, complains of the said W. A. Morris and C. E. Poteate, defendants, for that the said plaintiff is the owner of and entitled to the immediate possession of the following personal property, to wit: eight hundred and five head of Texas cattle, road-branded "J," and having various other brands and marks, of the value of eleven thousand one hundred and sixty-five dollars, which said cattle are numbered, branded, described, and valued as follows, to wit:

72 Two hundred and fifty head of beeves, road-branded "J," of the value of twenty dollars each, and of the full value of five thousand dollars; two hundred and twenty-five cows, road-branded "J," of the value of thirteen dollars each, and of the full value of twenty-nine hundred & twenty-five dollars; eighty head of three-year-olds, road-branded "J," and of the value of thirteen dollars each, and of the full value of one thousand and forty dollars; one hundred and seventy-five head two year-olds, road-branded "J," and of the value of ten dollars each, and of the full value of seventeen hundred and fifty dollars; seventy-five head of yearlings, of the value of six dollars each, and of the full value of four hundred and fifty dollars.

That the said defendant wrongfully, unjustly, and unlawfully detains

in his possession the said cattle aforesaid and from the said plaintiff; and the said plaintiff further avers that the said defendant did so wrongfully detain the possession of said cattle for the space of three days next before the commencement of this action, and wholly deprived the
73 plaintiff of the use and benefit thereof during that said length of time, to the damage of plaintiff three hundred dollars.

Wherefore the said plaintiff prays an order against the said defendant, that he may be ordered to deliver to the said plaintiff the said cattle aforesaid, and also a judgment against the said defendant for said sum of $300.00, his damages sustained by reason of such unlawful detention, and for costs of suit.

A. J. GREGORY,
By M. C. BROWN, *his Att'y.*

(Endorsed on the back of said petition as follows, to wit:) 312. A. J. Gregory vs. W. A. Morris and C. E. Poteete. Petition in replevin. Filed Oct. 4th, 1873. J. W. Bruner, clerk, by J. W. Meldrum, deputy. M. C. Brown, att'y for pl'ff.

74 *Answer.*

TERRITORY OF WYOMING,
Albany County, ss:

District court, first judicial district.

A. J. GREGORY
vs.
W. A. MORRIS & CHA'S E. POTEET. } In replevin.

And now comes the said defendants, and, for answer to the petition of the said plaintiff say that they deny each and every allegation contained in his said petition, and of this they put themselves upon the country.

And for further answer to the said petition of the said plaintiff, the defendants say that they do not wrongfully detain the said cattle from the said plaintiff, as he has in his said petition alleged, and of this they put themselves upon the country.

W. A. MORRIS &
CHARLES E. POTEET,
By their att'y, J. W. KINGMAN.

(Endorsed on back of said answer as follows, to wit:) A. J. Gregory vs. W. A. Morris et al. Answer. Filed Oct. 25th, 1873. J. W. Bruner, clerk, by J. W. Meldrum, deputy. W. A. Morris et al., by their att'y, J. W. Kingman.

75 *Amended answer.*

TERRITORY OF WYOMING,
Albany County, ss:

District court, second judicial district.

A. J. GREGORY
vs.
W. A. MORRIS & C. E. POTEET. } In replevin.

And now comes the defendants in the above-entitled action, and, by leave of the court here first had and obtained, amend their answer herein as follows, to wit:

3rd. And for further answer in this behalf, these defendants allege that

by the terms of the contract of sale by which the said plaintiff purchased the said cattle of the said W. A. Morris, and which said contract is in writing, duly acknowledged and recorded in the Albany County records, it is stipulated and agreed that the said Morris should send a man, to be by him selected, along with said cattle, to keep possession of the same for said Morris, and that the said C. E. Poteet was so selected, and came with said cattle to said Albany County, and kept possession of them according to the terms of said contract; and the defendants also allege that under and by the terms of said contract of purchase the said Poteet, or whomsoever the said Morris might appoint, might take and sell the whole or a sufficient number of said cattle to pay the balance due said Morris under the terms of said contract, and that said Poteet did, on the 4th day of October last, by virtue of said contract, and by virtue of a written power of attorney from said Morris, take possession of all of said cattle for the purpose of selling the same, as he lawfully might do; and at the time of the service of said replevin-writ on him he was in the quiet, peaceable, and lawful possession of the same, and had the right to hold and keep said possession for the purposes aforesaid; and of this the said defendants put themselves upon the country.

J. W. KINGMAN,
Att'y for Def'ts.

(Endorsed on back as follows, to wit:) A. J. Gregory vs. Morris & Poteet. Amended answer. Filed March 17, '74. J. W. Meldrum, clerk. J. W. Kingman, att'y for def'ts.

76 *Verdict of jury.*

TERRITORY OF WYOMING,
Albany County, ss:

District court, second judicial district.

A. J. GREGORY
vs.
W. A. MORRIS & C. E. POTEET. } In replevin.

We, the jury, find for the defendants, and assess the damages at seven thousand four hundred and fifty-four and $\frac{90}{100}$ dollars, ($7,454.90.)

C. H. BUSSARD,
Foreman.

LARAMIE CITY, *March 18th*, 1874.

(Endorsed on back of said verdict as follows, to wit:) Verdict. Filed March 18, '74. J. W. Meldrum, clerk.

77 *Motion for new trial.*

TERRITORY OF WYOMING,
County of Albany, ss:

In the district court, 2nd judicial district.

A. J. GREGORY, PLAINTIFF,
vs.
W. A. MORRIS AND C. E. POTEET, DEFENDANTS. }

The said plaintiff now comes, by his attorney, and moves the court now here to set aside the verdict returned by the jury in this action, and for a new trial of this cause, for the following reasons, to wit:

I. Because the assessment of damages is manifestly erroneous and much larger than the evidence in the case warrants or will sustain.

II. Because the said verdict is not sustained by sufficient evidence, and is contrary to law.

III. Because the court erred in permitting the defendant to
78 amend his answer and present a new issue in the case after all the evidence for the plaintiff had been submitted, over the objection of plaintiff's counsel, to which said ruling of the court the plaintiff, by his counsel, then and there excepted.

IV. Because the court erred in the trial of said cause in permitting the defendants, by their attorney, in the cross examination of witnesses, to propound certain questions in relation to certain written contracts, about which said contracts no enquiry had been made in the examination-in-chief, over the objection of plaintiff's counsel, to which said ruling of the court the said plaintiff, by his attorney, then and there excepted.

V. Because the court erred in permitting the defendants to introduce certain documentary evidence, purporting to be a contract between the parties to this suit, a power of attorney, and a receipt, over the objection of plaintiff's counsel, to which said ruling of the court exception was then and there taken.

79 VI. Because the court erred on the trial of this cause in instructing the jury "that the written contract between Morris and Gregory, in connection with the bill of sale, receipt, and power of attorney, necessarily explain and define the rights and interests of the parties to this action in the property in question," over the objection of the plaintiff's counsel, to which said ruling of the court the plaintiff then and there excepted.

VII. Because the court erred on the trial of this cause in instructing the jury that a contract to pay in gold was valid, and payment in kind should be enforced; that the jury should return their verdict in dollars and cents, and compute the difference between the value of gold and currency, where no evidence had been introduced to show that gold possessed any special value over currency, over the objection of counsel for plaintiff, to which said ruling of the court plaintiff, by his attorney, then and there excepted.

80 VIII. Because the court erred on the trial of this cause in giving certain other instructions to the jury asked for and put in writing by defendants' attorney, numbered 3, 4, & 5, over the objection of plaintiff's attorney, to which said ruling the plaintiff, by his attorney, then and there excepted.

IX. Because the court erred on the trial of this cause in refusing to instruct the jury as requested by plaintiff's attorney, in his written instructions requested, and numbered 2, 3, 4, part of 5, 7, 8, & 9, to which said ruling of the court the plaintiff then and there excepted.

X. Because the verdict is not in due form, as required by law, and because no judgment can be lawfully made thereon.

XI. Because of the improper conduct of the jury in this, to wit, that J. W. Kingman, attorney for the said W. A. Morris and C. E. Poteet, def'ts, corruptly, unlawfully, and with a purpose to improperly influence one of said jurors, to wit, one N. K. Boswell, by talk
81 ing to him in an improper manner, and by holding out to him corrupt and improper inducements.

XII. Because the court erred in ordering certain papers, documentary evidence, to wit, the contract, receipt, & bill of sale offered in evidence, and the statutes of the Territory, to be taken to the jury-room with the

jury when they retired for the consideration of said cause, over the objection of plaintiff's counsel, to which said ruling and order of the court counsel then and there excepted.

(Sig'd) M. C. BROWN,
Att'y for Pl'ff.

(Endorsed on back as follows, to wit:) A. J. Gregory vs. W. A. Morris et al. Motion to vacate verdict and for new trial. Filed March 20th, 1874. J. W. Meldrum, clerk. M. C. Brown, att'y for pl'ff.

82 *Affidavit of N. K. Boswell, juror.*

TERRITORY OF WYOMING,
County of Albany, ss:

A. J. GREGORY }
vs. }
MORRIS ET AL. }

I, N. K. Boswell, being first duly sworn, on oath that I was one of the petit jurors in the trial of the above-entitled cause; that during the trial of said cause, J. W. Kingman came to me, after he had moved the court orally in case of myself against H. B. Rumsey, to have myself punished for contempt in my suit, and after I had been sworn as a juror in said case of A. J. Gregory vs. Morris et al., and told me that he had no hard feelings towards me, and says, "I forgot you were on the jury in this case. I must keep on the right side of you until this case is decided." He was then speaking of the case of Gregory vs. Morris et al., then on trial. He said further, "You had better have them" (meaning my attorneys) "drop the matter," and "he would." I made no reply, thinking at the time it was an attempt on Judge Kingman's part to influence me as a juror in the case then being tried. I mentioned this matter to my attorney in my suit against H. B. Rum-
83 sey, and he advised me not to mention it then, as it would benefit neither party at that time.

In making up the verdict, I understood the instructions of the court to be that we were to find the total amount of the indebtedness of plaintiffs to defendants, and had I understood the charge of the court to be as asked by the defendants' attorney, that we were to find only the damages of said defendants, and have no regard to the indebtedness of plaintiff to defendants, I would not have consented to bring in the verdict rendered.

N. K. BOSWELL.

Subscribed and sworn to before me this 20th day of March, A. D. 1874.
J. W. MELDRUM,
Clerk Court.

(Endorsed on back as follows:) A. J. Gregory *vs.* W. A. Morris et al. Affidavit of N. K. Boswell. Filed March 20th, 1874. J. W. Meldrum clerk. M. C. Brown, att'y for plaintiff.

84 *Journal-entry.*

MONDAY, *February 2nd*, 1874.

Be it remembered that, at the regular February term, A. D. 1874, of the district court of the 2nd judicial district of the Territory of Wyo-

ming, begun and held at Laramie City, within and for the county of Albany, according to law, on the 2nd day of February, A. D. 1874—Hon. E. A. Thomas, presiding; T. J. Dayton, sheriff; J. W. Meldrum, clerk—

Be it remembered that the following proceedings were had, to wit:

MONDAY, *March 16th*, 184.

A. J. GREGORY
vs.
W. A. MORRIS AND C. E. POTEET.

And now, on this 16th day of March, A. D. 1874, this cause being called for trial, came the defendants in this cause, by their attorney, J. W. Kingman, and moves the court here to set aside T. J. Dayton, the sheriff of said county, so far as returning jurors in this case is concerned, and to appoint in his place some suitable and disinterested per-
85 son to select and summon such jurors as may be required as tal'smen in said trial; and the court having duly considered the same, ordered that the said motion be, and the same is hereby, overruled; to all of which ruling and order of the court in so overruling said motion the defendants, by counsel, then and there excepted.

And now came a jury, to wit, N. K. Boswell, A. S. Blackburn, John A. Fischer, F. A. Blake, J. H. Triggs, C. H. Bussard, W'm Burns, John A. Wright, George Cardwell, J. J. Fien, Paul Fuhr, & Louis Miller, who are tried, empan*n*elled, and sworn the truth to speak upon the issue joined between the parties; and, after hearing the evidence on the part of the plaintiff in this cause, it is ordered by the court that the said jury be discharged from further attendance until to-morrow morning at 9 o'clock.

TUESDAY, *March 17th*, 1874.

A. J. GREGORY
vs.
W. A. MORRIS ET AL.

Comes now the jury heretofore empan*n*elled and sworn to try this cause, who, being called, are found to be all present. Whereupon the trial is resumed, and, after hearing the conclusion of the evidence in this
86 behalf, it is ordered by the court that the said jury be discharged from further attendance until to-morrow morning at 9 o'clock.

WEDNESDAY, *March 18th*, 1874.

A. J. GREGORY
vs.
W. A. MORRIS ET AL. 312.

Comes now the jury heretofore empan*n*elled and sworn to try this cause, who, being called, are found to be all present; after hearing the arguments of counsel and being duly charged by the court, retired for deliberation in charge of a sworn officer.

And comes now the jury aforesaid, and upon their oath aforesaid return into court the following verdict, to wit:

Verdict of jury.

TERRITORY OF WYOMING,
Albany County, ss:

District court, 2nd judicial district.

J. GREGORY
vs.
W. A. MORRIS AND C. E. POTEET. } In replevin.

We, the jury, find for the defendants, and assess the damages at seven thousand four hundred and fifty-four and $\frac{90}{100}$ dollars, ($7,454.90.)

C. H. BUSSARD,
Foreman.

LARAMIE CITY, *March 18th*, 1874.

87 *Order of court overruling motion for new trial.*

SATURDAY, *March 28th*, 1874.

A. J. GREGORY
vs.
W. A. MORRIS ET AL. } 312. Replevin.

Comes now the parties to this action, by their attorneys, and thereupon came on to be heard the motion of the plaintiff for a new trial of this cause; and the court, being fully advised in the premises, ordered that the said motion be, and the same is hereby, overruled; to all of which ruling and order of the court in so overruling said motion the plaintiff, by counsel, then and there excepted.

Judgment.

And now comes Hon. J. W. Kingman, counsel for defendants, and moves the court that judgment be entered in accordance with the verdict of the jury, heretofore returned in this behalf. Whereupon it is ordered and adjudged by the court that judgment be, and the same is hereby, entered against the said plaintiff, A. J. Gregory, and in favor of the said defendants, Wade A. Morris and C. E. Poteet, in the sum of ($7,454.90) seven thousand four hundred and fifty-four & $\frac{90}{100}$ dollars.

And it is further ordered & adjudged that the said defendants, Wade A. Morris and C. E. Poteet, shall have and recover from the said plaintiff, A. J. Gregory, the aforesaid sum of $7,454.90 and the costs of this action, taxed at ($35.30) thirty-five and $\frac{30}{100}$ dollars.

88 *Clerk's authentication of record.*

TERRITORY OF WYOMING,
County of Albany, ss:

I, J. W. Meldrum, clerk of the district court, 2nd judicial district, in and for the county and Territory aforesaid, do hereby certify that the foregoing pages is a true and correct transcript of the bill of exceptions, petition, answer and amended answer, verdict of the jury, motion to vacate verdict, and for new trial, affidavit of N. K. Boswell, and the journal-entries, in the case entitled A. J. Gregory vs. W. A. Morris and

C. E. Poteet, number 312, so full and entire as the same remain of record in my office.

Witness my hand and the seal of said court, hereto attached, this 5th day of May, A. D. 1874.

[WYOMING TERRITORY, ALBANY COUNTY, SECOND DISTRICT COURT.] J. W. MELDRUM, *Clerk Dist. Court, 2nd Jud. Dist.*

(Endorsed on the back as follows, to wit:) No. 64. A. J. Gregory, plaintiff in error, vs. W. A. Morris and C. E. Poteet, def'ts in error. Petition in error & transcript. Filed July 27th, 1874. J. W. Bruner, cl'k sup. court. W. W. Corlett & M. C. Brown, att'ys for def'ts in error.

89 And on the said 27th day of July, A. D. 1874, there was issued out of said supreme court a summons in error in the words and figures following, to wit:

TERRITORY OF WYOMING, *ss:*

To the sheriff of Albany County, greeting:

You are hereby commanded to notify W. A. Morris and C. E. Poteet, or their attorney of record, that a petition in error has been filed in the case of A. J. Gregory against W. A. Morris & C. E. Poteet in the supreme court of said Territory.

And make due return in what manner you have executed this writ on or before the 19th day of October, A. D. 1874.

Witness the Hon. J. W. Fisher, chief-justice of our said supreme court, at Cheyenne City, the capital of said Territory, and the seal of said supreme court, this 27th day of July, A. D. 1874.

[SUPREME COURT SEAL.] J. W. BRUNER, *Clerk Supreme Court Wyoming Territory.*

90 I hereby certify that I received the within summons on the 27th day of July, A. D. 1874, at 3 p. m., and served the same at Albany Co., W. T., Aug. 1st, 1874, by delivering a true and certified copy to J. W. Kingman, att'y for the pl'ffs.

No service had on W. A. Morris & C. E. Poteet. Not found in Albany Co., W. T., Aug. 3rd, 1874.

T. J. DAYTON, *Sheriff.*

Fees: Service, 50c.; mileage, 30; return, 25; copy, 30—1.35.

(Endorsed on back as follows, to wit:) A. J. Gregory, pl'ff in error, vs. W. A. Morris & C. E. Poteet, def'ts in error. Summons in error. Filed Aug. 5th, 1874. J. W. Bruner, clerk sup. court.

91 And thereafter, to wit, on the 30th day of April, A. D. 1875, at the regular March term, 1875, of the supreme court of Wyoming Territory, the following judgment was entered of record on the journal of said court, in the words and figures, to wit:

March term, 1875.

FRIDAY, *April 30th*, 1875.

A. J. GREGORY
vs.
W. A. MORRIS AND C. E. POTEET.

And thereupon, the court being now fully advised in the premises, it is now considered, ordered, and adjudged by the court that the judgment

of the court below be, and is hereby, fully affirmed and stand in full force and effect.

Wherefore it is ordered and adjudged that the said W. A. Morris and C. E. Poteet have and recover from the said A. J. Gregory the sum of ($7,454 90) seven thousand four hundred and fifty-four & $\frac{90}{100}$ dollars, being the amount of the judgment of the district court, with legal
92 interest and costs to be added thereon, and the further sum of 5% damages on the amount of said judgment, amounting to the sum of $372.74, as it is considered by this court that there was no sufficient ground for bring ng said cause to this court.

And it is further ordered that a writ of procedendo be awarded to the court below, to carry into effect its judgment, and that execution issue therefor against the said A. J. Gregory for the moneys aforesaid and the balance of costs of this court, taxed in the sum of $7.75; to which rulings and judgment of the court the said appellant, by his attorneys, then and there excepted.

J. W. FISHER,
Chief-Justice Wyoming Territory.

93 And on the 29th day of April, A. D. 1875, there was filed in the clerk's office of said supreme court an opinion of court, in the words and figures following, to wit:

A. J. GREGORY, PL'FF IN ERROR,
vs.
W. A. MORRIS & C. E. POTEET, DEF'TS IN ERROR.

Error to the district court, 2nd judicial district, for Albany county. February term, 1874.

This was an action in replevin, brought to this court from the February term, A. D. 1874, of the district court in and for the county of Albany, in the second judicial district of the Territory of Wyoming.

History of the case.

The record of the case shows that on the 26th day of February, A. D. 1873, W. A. Morris, one of the def'ts in error, and A. J. Gregory, pl'ff in error, entered into a written contract, in the city of Austin, in the
94 State of Texas, stipulating for the sale of a large number of cattle to A. J. Gregory, in accordance with a schedule of prices attached to and made a part of the record in this action. One of the terms of said contract was that the said Morris, having sold and delivered to said Gregory the cattle referred to in the written contract, was to retain a lien on the cattle until the whole of the purchase-money, amounting to between $7,000 and $8,000, should be paid by Gregory, and that, in the event of the balance of said purchase money not being paid on or before the first day of October, A. D. 1873, that then the agent of Morris, viz, C. E. Poteet, was to sell all or such portion of said cattle as would pay the purchase-money then remaining due and unpaid, as well as the wages and other expenses of said Poteet, as had been stipulated for in the said written contract.

The written contract having been duly signed by the parties, Morris gave Poteet a power of attorney, authorizing him to accompany and retain the lien provided for in said contract.

The parties arrived on the Laramie plains with said cattle some

95 time in the month of September, A. D. 1873, and the cattle remained in the possession of Gregory from that time until the 4th of Oct., 1873, at which time, the purchase-money not having been paid, Poteet took forcible possession of the cattle, and drove them from the ranch at which they were grazing to the ranch of M'r Alsop, some distance from there.

Gregory then brought his action in replevin to recover possession of the cattle, and damages for the wrongful detention thereof, against both Morris and Poteet, setting up the ordinary counts in his petition; M. C. Brown & W. W. Corlett for pl'ff in error. J. W. Kingman, attorney for the def't, filed an answer, denying all the allegations of pl'ff's petition, and denying specially that they wrongfully detained the said property.

The case coming on for trial in the district court, the plaintiff proved the possession, ownership, taking, demand, and detention of the property, with the value, &c.

The defendant then undertook to introduce the written contract and other documentary evidence, which was objected to by plaintiff's attorneys, and the objection was sustained by the court.

Def'ts then asked permission to amend their answer setting up
96 the special matter which had been refused under the orignal answer. This was also objected to by att'ys for plaintiff, but the objection was overruled; the written evidence was admitted; to which the plaintiff's attorneys reserved their "exceptions."

All the evidence on the part of the defendants was then given, together with certain rebutting evidence on the part of the plaintiff, and the case went to the jury, under certain instructions of the court, to some of which exceptions were saved, which will be adverted to hereafter, and the jury returned a verdict for defendants, assessing the damages at $7,454.90, and judgment was duly entered on the verdict.

The plaintiff's attorneys filed a motion for a new trial, and assigned the same errors which are brought to this court by petition in error.

The errors relied upon by the plaintiff in error, who was plaintiff below, are:

First. That the court below permitted the defendants to file an amended answer to plaintiff's petition, in which they set out the documentary evidence upon which they relied to defeat plaintiff's claim.
97

Second. That certain questions were permitted to be propounded to the plaintiff on his cross-examination touching the terms of the contract for the sale and purchase of the cattle taken in replevin.

Third. The instructions of the court below as well as the instructions refused to be given on behalf of the plaintiff.

There are a large number of exceptions taken, but we find that the foregoing embrace the substance of the whole.

Opin. by C. J. Fisher.

If there was any error on the part of the judge who presided at the trial of the case on the subject of permitting or refusing the written contract or other documentary evidence, we do not find that the plaintiff had the right to complain of it, from the fact that we are of the opinion that the defendants should have been permitted to have given the said evidence under the issues raised by the petition and answer.

The petition of the plaintiff set out the wrongful detention of the cattle, which constitutes the gist of the action in replevin, while the defendants set up the plea of non detinet. The plaintiff's attorneys

98 claim that the plea of non detinet at common law admits the title to be in the plaintiff. This, however, is clearly wrong. The plea of non cepit, which was the general issue at common law in actions in replevin, originally did admit the title to the property to be in the plaintiff, but this was only so long as actions in replevin were resorted to to recover goods and chattels distrained for rent. (See 3rd Blackstone, p. 13.) But under our statute the plea of non cepit is hardly ever set up, but the wrongful detention usually being the turning-point in the case, the plea of non detinet has virtually become the general issue.

If, then, the defendants plead the general issue, we think they should have been permitted to have proven property in the cattle taken in replevin. It is true the plea of "property" is set up in many of the courts in this country, but we think that under the practice in this Territory that the defendants had the right to prove property in themselves under their general denial, or at least under the special denial of the wrongful detention of the property.

Now, conceding this to have been error, was it such an error as
99 the plaintiffs could complain of? Surely not, the court having refused to permit defendants to give in evidence the testimony by which they could establish their right to the possession of the property taken in replevin.

We think the court below did right in permitting the defendants to amend their answer so that the facts might go to the jury. Amendments of this character are clearly permissable under the code of civil procedure of Wyoming. This is especially so when we take into consideration the ruling of the court on the objection of the evidence under the original answer filed. Another reason why we do not find any error in permitting the amendment to the answer to be filed is found in section 149 of the code of 1869, that "the court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." Now, while we do not find any error unless it be the refusal of the court to allow the documentary evidence to be given under the original answer, yet even if there was any other error surely the ruling of the court did not wrongfully affect the rights of the plaintiff.

100 The next point to be considered is whether the defendants had such a right of possession of the cattle in question as justified them in taking them into possession and refusing to surrender them to the plaintiff on demand being made.

A reference to the written contract, we think, is enough to satisfy any one on this question. Written contracts are supposed to contain the intentions of the contracting parties at the time they are made, and while ordinarily the delivery of chattels into the custody of the vendee is a transfer of the right of property from the vendor to the vendee, and as between them and third parties the law presumes that a change of possession carries with it a change of title, but as between the vendor and vendee there may very readily be such stipulations as causes the right of property to remain in the vendor, as gives him the right to resume possession upon the breach of any of the covenants contained in the stipulations of sale. (See 3 Parsons on Contracts, pp. 257-8.)

The record in this case discloses just such a contract, containing such a stipulation—that if the vendee failed to comply with the terms of the written contract, that then the property was to revert to the ven-
101 dor under other covenants in said contract.

The next point to be considered is the instructions of the court,

viz, that the rights of the parties are to be determined by the terms of the written contract; but having treated of this under the second point considered, we need not enlarge here, as we deem it sufficient to say that we find no error in the instructions given.

There is another error complained of, and that is that the verdict of the jury should have been based upon a gold standard, inasmuch as the sum due on the contract was payable in gold; but this suit not having been brought on the contract, but for damages for the wrongful taking and detention of the property, the jury did right in returning their verdict without reference to the standard of either gold or currency.

There is one other question raised by the plaintiff in error which, perhaps, demands the attention of this court, and which has not been referred to; and that is, the extent to which the jury, as it is claimed, should have gone in making up their verdict. The code of this Territory provides that where the property taken in replevin has been taken by the plaintiff, and the jury find for the defendant, they shall
102 find whether the defendant at the commencement of the action had the right of property or the right of possession only, and in either case shall assess such damages as they shall think right and proper for the defendant; for which, with cost of suit, the court shall render judgment for def't. (Civil code of Wyoming, 1869, sec. 195.)

We do not think the "finding" of either of the matters specified in the section constitutes a returning of a verdict, but rather the consideration of the grounds upon which the verdict is based. In other words, the jury is instructed to find whether a certain state of facts exist, and, if so, they shall return their verdict accordingly, and not that the jury are to return the grounds upon which the verdict is based. It is true M'r Seney, in his code, holds that a general verdict is not sufficient, and cites a case decided by one of the courts of Ohio on the point; but with all due deference to that authority, we are of the opinion that in this case no good would be accomplished by such a special finding, nor has any injury been sustained by either party in consequence of the general verdict; and as our code provides that the proceedings shall not
103 be disturbed on account of any informality which does not affect injuriously either party, we do not find this a ground to disturb the verdict.

We think substantial justice has been done, and that the verdict of the jury is amply sufficient to sustain all the rights of the parties.

The judgment of the court below is affirmed.

(Endorsed on the back as follows, to wit:) A. J. Gregory vs. W. A. Morris & C. E. Poteet. Opinion of court. Filed April 29th, 1875. J. W. Brumer, clerk S. C.

Thereafter, to wit, on the 1st day of May, A. D. 1875, there was filed in the clerk's office of said supreme court an affidavit in the words and figures following, to wit:

104 *Affidavit of value of property and amount in controversy.*

UNITED STATES OF AMERICA, *ss:*

In Supreme Court of the United States.

A. J. GREGORY, PL'FF IN ERROR,
vs.
W. A. MORRIS AND C. E. POTEET, DEFENDANTS.

I, W. W. Corlett, being duly sworn, on my oath do depose and say that I am one of the attorneys for said A. J. Gregory in the aforesaid

cause, and that the value of the property and the amount in controversy in the above cause exceeded the sum of one thousand dollars.

W. W. CORLETT.

Sworn to before me and subscribed in my presence this 1st day of May, 1875.

J. W. BRUNER,
Clerk Supreme Court Wyoming Territory.

(Endorsed on back as follows, to wit:) A. J. Gregory vs. W. A. Morris and C. E. Poteet. Affidavit as to value of property and amount in
105 controversy. Filed May 1st, 1875. J. W. Bruner, cl'k sup. court.

Thereupon, on said 1st day of May, A. D. 1875, there was filed in the clerk's office of said supreme court a bond in the words and figures following, to wit:

106 Supreme Court of the United States.

A. J. GREGORY, PL'FF IN ERROR,
vs.
W. A. MORRIS AND C. E. POTEET, DEF'TS IN error.

Know all men by these presents that we, A. J. Gregory, Ora Haley, Edward Farrell, J. Millard Fillmore, and J. W. Meldrum, of Albany County, in the Territory of Wyoming, are held and firmly bound unto W. A. Morris and C. E. Poteet, of Austin, in the State of Texas, in the sum of eighteen thousand dollars, ($18,000.00,) to be paid to the said W. A. Morris and C. E. Poteet, their heirs, executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 28th day of April, A. D. 1875.

Whereas the above-named A. J. Gregory hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action in the supreme
107 court of the Territory of Wyoming:

Now, therefore, the condition of this obligation is such that if the above-named A. J. Gregory shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

A. J. GREGORY. [SEAL.]
ORA HALEY. [SEAL.]
EDWARD FARRELL. [SEAL.]
J. MILLARD FILLMORE. [SEAL.]
J. W. MELDRUM. [SEAL.]

108 TERRITORY OF WYOMING,
County of Albany:

Ora Haley, being first duly sworn, on oath says that he is a resident of Albany County, Wyoming Territory, and that he is worth the sum of ten thousand dollars over and above all his just debts, exemptions, & liabilities, according to the laws of the Territory of Wyoming.

ORA HALEY.

Subscribed and sworn to before me this 28th day of April, A. D. 1875.
[COURT SEAL.]
J. W. MELDRUM,
Clerk Court 2 Dist. of Wyoming.

TERRITORY OF WYOMING,
County of Albany:

J. Millard Fillmore, being first duly sworn, on oath says that he is a resident of Albany County, Wyoming Territory, and that he is worth the sum of five thousand dollars over and above all his just debts, exemptions, & liabilities, according to the laws of the Territory of Wyoming.

J. MILLARD FILLMORE.

Subscribed and sworn to before me this 28th day of April, A. D. 1875.
[COURT SEAL.]

J. W. MELDRUM,
Clerk Court 2 Dist. of Wyoming.

TERRITORY OF WYOMING,
County of Albany:

J. W. Meldrum, being first duly sworn, on oath says that he is a resident of Albany County, Wyoming Territory, and that he is worth the sum of three thousand dollars over and above all his just debts,
109 exemptions, & liabilities, according to the laws of Wyoming Territory.

J. W. MELDRUM.

Sworn and subscribed to before me this 28th day of April, A. D. 1875.
[COURT SEAL.]

E. A. THOMAS,
Associate Justice Supreme Court Wyoming,
& Presiding Judge 2d Dist.

(Endorsed on the back as follows, to wit:) A. J. Gregory vs. W. A. Morris and C. E. Poteet. Bond for writ of error & supersedeacs. May 1st, 1875.

The within bond has been duly examined and approved.

J. W. FISHER,
Chief-Justice of the Supreme Court of Wyoming Territory.

Filed May 1st, 1875.

J. W. BRUNER,
Clk Sup. Court.

110 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Wyoming, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between A. J. Gregory, plaintiff, and W. A. Morris and C. E. Poteet, defendants, a manifest error hath happened, to the great damage of the said A. J. Gregory, as by his complaint appears: we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-
111 mand you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of next October, A. D. 1875, on the 11th day thereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, this the 1st day of May, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.]

J. W. BRUNER,
Clerk Supreme Court Wyoming Territory.

(Indorsed:) A. J. Gregory vs. W. A. Morris and C. E. Poteet. Writ of error. Filed May 1st, 1875. J. W. Bruner, clerk supreme court Wyoming Territory.

112 UNITED STATES OF AMERICA, *ss:*

To W. A. Morris and C. E. Poteet, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Wyoming, wherein A. J. Gregory is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this first day of May, in the year of our Lord one thousand eight hundred and seventy-five.

J. W. FISHER,
Chief-Justice of the Supreme Court of the Territory of Wyoming.

113 TERRITORY OF WYOMING,
County of Albany, ss:

I, M. C. Brown, being first duly sworn, on oath say: I am one of the attorneys for the plaintiff, A. J. Gregory; that I know J. W. Kingman, the attorney of record for the defendants in this action; that on the 13th day of May, A. D. 1875, I made service of this instrument by delivering a true and correct copy hereof to the said J. W. Kingman, defendants' attorney, at Laramie City, in the county of Albany, Wyoming Territory, which said copy he then and there accepted. And further affiant saith not.

M. C. BROWN.

Sworn before me this 13th of May, 1875.

E. A. MURRAY,
Judge 2nd District.

(Indorsed:) S. C. No. 64. A. J. Gregory vs. W. A. Morris and C. E. Poteet. Citation. Filed May 17th, 1875. J. W. Bruner, cl'k sup. court.

114 TERRITORY OF WYOMING, *ss:*

Supreme court.

I, J. W. Bruner, clerk of the supreme court of Wyoming Territory, do hereby certify that the foregoing pages contain a true and correct copy of the petition in error, with transcript annexed, summons in error, and return thereon, final judgment entry, opinion of supreme court, affidavit of value of property and amount in controversy, and bond for writ of error & supersedeas, together with the writ of error

and citation in the case of A. J. Gregory, plaintiff in error, versus W. A. Morris and C. E. Poteet, defendants in error, as full and entire as the same remain on file and of record in the office of said supreme court.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court this 18th day of September, A. D. 1875.

[SEAL.] J. W. BRUNER,
Clerk Supreme Court Wyoming Territory.

115 TERRITORY OF WYOMING, *ss:*

Supreme court.

I, J. W. Fisher, chief-justice of the supreme court of Wyoming Territory, do hereby certify that J. W. Bruner, whose name is subscribed to the foregoing certificate, now is and was at the time of signing and sealing the same the clerk of said supreme court, and keeper of the seal and records thereof, duly appointed and qualified to office; that full faith and credit are and of right ought to be given to all his official acts as such, in all courts of record in the United States and elsewhere; that I am well acquainted with his signature, and verily believe the name subscribed to the foregoing certificate is his signature, and that said certificate is in due form of law and by the proper officer.

Witness my hand this 18th day of September, A. D. 1875.

J. W. FISHER,
Chief-Justice of the Supreme Court of Wyoming Territory.

116 TERRITORY OF WYOMING, *ss:*

Supreme court.

I, J. W. Bruner, clerk of the supreme court of the Territory of Wyoming, do hereby certify that J. W. Fisher, esq., whose name is subscribed to the foregoing certificate, was, at the time of the date thereof, the chief-justice of said supreme court, duly commissioned and qualified as such, and that his signature thereto is genuine.

Witness my hand and the seal of said supreme court, hereto attached, at Cheyenne City, in said Territory, this 18th day of September, A. D. 1875.

[SEAL.] J. W. BRUNER,
Clerk Supreme Court.

Costs of this transcript	$32 30
" " in supreme court	12 75
Total	$45 05

(Indorsement on cover:) No. 227. A. J. Gregory, plaintiff in error, vs. W. A. Morris & C. E. Poteet. Wyoming Ter't'y sup. court. Filed 16th October, 1875.

O

In the Supreme Court of the United States.

No. 227.

A. J. GREGORY,
Plaintiff in Error,

Vs.

W. A. MORRIS AND C. E. POTEET,
Defendants in Error.

In Error to the Supreme Court of Wyoming Territory.

BRIEF FOR PLAINTIFF IN ERROR.

M. C. BROWN,
W. W. CORLETT,
Counsel for Plaintiff in Error.

Judd & Detweiler, Printers.

UNITED STATES OF AMERICA.

In the Supreme Court of the United States.

A. J. GREGORY, PLAINTIFF IN ERROR,

vs.

W. A. MORRIS AND C. E. POTEET, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Case.

The said A. J. Gregory, on the 4th day of October, A. D. 1873, filed his petition in the district court of the (then) first judicial district for the Territory of Wyoming, alleging in substance that he was then the lawful owner of, and entitled to the immediate possession of a lot of cattle therein particularly described, and that the same cattle were then unlawfully detained from him by the defendants, and therefore prayed judgment for the return of the cattle, and for three hundred ($300) dollars damages, alleged to have been sustained in consequence of such unlawful detention.

A summons was duly issued out of said Court, for said defendants, and such proceedings were then taken under the provision of the Civil Code of Wyoming Territory, respecting the "claim and delivery of personal property;" that the property described in said plaintiff's petition was taken and delivered to the said plaintiff in error in whose hands it was, by virtue of such proceedings, when the case was tried in the said district court. On October 25th, A. D. 1873, the said defendants in error filed their answer, de-

nying generally all the allegations of the said petition, and also specifically denying that the defendants wrongfully detained the said cattle from said plaintiff. On the issue thus formed by said petition and answer, they proceeded to trial on the 16th day of March, A. D. 1874.

A. J. Gregory, Ora Haley, Capt. Manchester, and W. E. Johnson testified for the plaintiff. The testimony of A. J. Gregory was in substance; that he was the unqualified owner of the cattle; that he had bought them in the State of Texas, in April, 1873. That the cattle were there delivered to him, and he then drove them to Wyoming Territory, where they were forcibly taken from him by C. E. Poteet, one of the above-named defendants; that Poteet had taken forcible possession of the cattle on the 4th day of October, A. D. 1873, and that the said plaintiff in error had been in the sole, exclusive and undisputed possession of said cattle from the said month of April, the time of purchase, up to the said 4th day of October, A. D. 1873.

See testimony of Gregory, on pages 8, 9, and 10 of printed transcript of Record.

The testimony of other witnesses related principally to the matter of damages, and to the fact of Gregory being in the sole and exclusive possession of the cattle.

See pages 10, 11 and 12 of printed transcript of of Record.

The plaintiff then rested, and the defendants then offered certain documentary evidence which is fully set forth in the assignment of errors herein, and on objection of the plaintiff the same was excluded by the court. The defendants, over the objection of the plaintiff, filed an amended answer.

See pages 22 and 23 of printed transcript of Record.

The amended answer alleges in substance that the defendant, Poteet, took possession of the cattle in question as the agent of the defendant Morris, by virtue of a certain contract between said plaintiff and said Morris, and a certain power of attorney given by said Morris to said Poteet.

After filing said amended answer in the case the defendants gave in evidence, over the objection of the plaintiff, certain documentary evidence, hereinafter fully set forth,

and the testimony of C. E. Poteet, and no further evidence was offered.

See pages 15 and 16 of printed transcript of Record.

The court then charged the jury, and they rendered a verdict for $7,454.90 for both defendants.

See page 23 of printed transcript of Record.

The plaintiff then moved the court to set aside the said verdict and grant a new trial for reasons assigned.

See pages 23 and 24 of printed transcript of Record.

The court overruled said motion, and rendered judgment on said verdict in favor of both defendants for said $7,454.90 and costs of suit.

See page 27 of printed transcript of Record.

And thereafter the plaintiff, on leave obtained, filed his petition in error in the supreme court of said Wyoming Territory.

See pages 5, 6, 7 and 8 of printed transcript of Record.

And also his bill of exceptions, duly allowed and signed by the judge of said district court, and the supreme court of said Territory, after hearing the arguments of counsel for the several parties, sustained the rulings and affirmed the judgment of the said district court in said case.

See pages 28 and 29 of printed Transcript of Record, and also the Opinion of the Court.

See pages 29, 30, 31 and 32, printed transcript of Record.

Whereupon the plaintiff prosecutes his writ of error in this Honorable Court.

The following being the assignment of errors relied upon by said plaintiff in error, and contained in his transcript of the record of the proceedings of said supreme court of said Wyoming Territory, filed in this honorable Court, on the 16th day of October, A. D. 1875.

Assignment of Errors.

1st. That said Supreme Court erred in sustaining the ruling of district court, before which the said cause was tried in instructing the jury as follows, to wit: "The jury must compute the damages and return their verdict on that computation, in dollars and cents; and if the jury find the contract on the part of the plaintiff was to pay a certain sum of money in gold, they will compute the difference between gold and currency, and render their verdict in dollars and cents in currency;" and in not reversing the judgment of said district court, because of the giving of said instruction to the jury.

See page 18, Instruction No. 6, printed transcript of Record.

2d. That said Supreme Court erred in sustaining the ruling of said district court in giving to the jury, upon the trial of this cause, the following instruction: "That the written contract between Morris and Gregory, in connection with the bill of sale, the receipt, and the power of attorney to Poteet, necessarily explain and define the rights and interests of the parties to this action in the property in question;" and in not reversing the judgment of said district court because of the giving of said instruction to the jury.

Page 18, Instruction No. 1, printed transcript of Record.

3d. That said Supreme Court erred in sustaining the ruling of said district court in giving to the jury, upon the trial of this cause, the following instruction: "That by and under those papers the defendants had a legal right to take possession of the cattle in question, on or after the first day of October last, and retain such possession for the purpose of selling them according to the terms of said contract;" and in not reversing the judgment of said district court because of the giving of said instruction to the jury.

See page 18, Instruction No. 2, printed transcript of Record.

4th. That said Supreme Court erred in sustaining the ruling of said district court in giving to the jury, upon the

trial of this cause, the following instruction: "That Poteet, in pursuance of his power of attorney, took possession of said cattle, and removed them to Alsop's ranche, for the purpose of selling them, according to the terms of said contract, then they must find the right of possession in the defendant at the commencement of this action, and must assess such damages for the defendants as are just and proper;" and in not reversing the judgment of said district court for the giving of said instruction to the jury.

See page 18, Instruction No. 3, printed transcript of Record.

5th. That the Supreme Court erred in sustaining the ruling of said district court in giving to the jury, upon the trial of the cause, the following instruction: "That the pleadings in this case put in issue only the right of possession at the time of the service of the writ of replevin, and you are instructed that the right of the plaintiff in these cattle at that time was only a right of redemption as a mortgagor after conditions broken, and that he had no right to the possession of the cattle, and no right to take them, by replevin or otherwise, from these defendants, or either of them, until he had paid or tendered the amount due on them under the contract;" and in reversing the judgment of said district court because of the giving of said instruction to the jury.

See page 18, instruction No. 4, printed transcript of Record.

6th. That the said Supreme Court erred in sustaining the ruling of said district court, in giving to the jury, on the trial of this cause, the following instruction: "If the jury find that, by the terms of the written contract, which must govern in this case, that the defendants, on the 1st day of October, 1873, had a right to sell these cattle, the right to sell necessarily carries with it the right of possession;" and in not reversing the judgment of said district court because of the giving of said instruction to the jury.

See page 18, instruction No. 7, printed transcript of Record.

7th. That said Supreme Court erred in sustaining the ruling of said district court, in refusing to give to the jury,

on the trial of this cause, the third instruction requested by plaintiff in error, which instruction so requested, was as follows: "If the vendor, Morris, made an agreement of sale and delivery, and, in conformity therewith did sell and deliver cattle to Gregory, the vendee, and by the terms of the agreement made between the parties the vendor was to have and maintain a lien upon the chattels or cattle for the balance of the purchased price, by keeping the said cattle in the possession of the vendor during the journey from Texas to Wyoming, until the 1st day of October, A. D. 1873, the vendee, Gregory, after receiving the cattle from Morris, must have first re-delivered the said cattle to Morris, and placed them in his hands as a pledge before the agreed lien of Morris for balance of purchase price could vest; and, second, if such re-delivery was made by Gregory, the vendee, to Morris, the vendor, and thereafter the vendor, Morris, by himself or his agent, by his own fault or carelessness, or negligence, permitted the possession of the said cattle to again pass to Gregory, the vendee, the vendor, Morris, thereby lost his lien and all right of possession, and right of property, and possession must thereafter vest and remain in Gregory;" and in not reversing the judgment of said district court because of its refusal to give said instruction to the jury.

See page 19, instruction No. 3, printed transcript of Record.

8th. That the said Supreme Court erred in sustaining the ruling of the district court, before which this cause was tried, in overruling the motion of the plaintiff in error to set aside the verdict of the jury in the cause, for the reason that the said verdict was not in due form as required by the law, and not in such form that a judgment could be rendered thereon, and in not reversing the judgment of said district court for said ruling.

See page 23 printed transcript of Record.

9th. That said Supreme Court erred in sustaining the action of said district court in rendering judgment upon the verdict of the jury in the case, the said verdict not being in the form required by law, nor in such form that any lawful judgment could be rendered thereon.

See page 27 printed transcript of Record.

10th. That said Supreme Court erred in sustaining the ruling of said district court in overruling the plaintiff in error's motion to set aside the verdict of the jury in the cause, and to grant a new trial.

See pages 23 and 24 of printed transcript of Record, in motion for new trial.

This assignment of error raises, among other questions of law, the refusal of the court below to give the following instructions, requested by plaintiff's attorney.

1. "A vendor of chattels, at common-law, has a lien upon the chattels so long as they remain in his possession, and no longer. By the sale the general property vests in the vendee, but a special property remains in the vendor, so long as he retains possession. A delivery to the vendee divests the lien, and after delivery no lien, special property, or right of possession vests in the vendor. Absolute title, as between the parties, then vests in the vendee."

See pages 18 and 19 printed transcript of Record.

2. "An agreement of sale and delivery of chattels with provision of lien by possession, places the property in precisely the same condition, as to the rights of the vendor, it would be in under a vendor's lien at common-law; the right of lien depends wholly upon possession."

See page 19 printed transcript of Record.

4. The written agreement between Morris and Gregory, to entitle it to consideration in this action, must be shown to have been properly executed by the parties hereto, and the party claiming right by or under the terms of the same, must first show that he has performed, or was ready, willing, and able to perform, all the conditions in said agreement contained to be by him performed under and by the terms thereof; "and one of the conditions of said agreement to be performed by the said Morris was the sale of and delivery of the said cattle to the said Gregory on a day certain."

"Was the delivery made? If yes, then title, full and complete, vested in Gregory. Was a re-delivery thereafter made by Gregory to Morris in such a manner that the lien under the contract could and did vest in Morris? If yes,

then did Morris continue in possession and have the full and entire control of the property until the 1st day of October, and until the cattle were driven away from Haley's ranch by Poteet, and thereby his lien maintained? If yes, then right of possession was in defendants, Morris and Poteet; and, if no, then title and right of possession was in the plaintiff, Gregory, at the commencement of this action."

See page 19 printed transcript of Record.

5. If the jury believe from the evidence that the plaintiff, Gregory, after having bought the property in question, and after having taken the same into his possession, re-delivered it to the defendants or either of them, and that the defendants retained the possession of the said property from thence during the journey from Texas to Wyoming, and up to the date of the commencement of this action, and thereby obtained and continued their lein in force, then the defendants were entitled to the possession of the cattle at the commencement of this action, the detention was not wrongful, and the jury must find for the defendants. The right of possession in this case, in the defendants, is a special property; and if the jury find for the defendants, they must find the value of the defendants' interest, if any, in the said property, and the defendants' measure of damages will be the value of his interest in the property, or the balance of the purchase price remaining unpaid.

See pages 19 and 20 printed transcript of Record.

And the further question as to the admissibility of the following evidence, brought out on the cross-examination of plaintiff's witness, Gregory.

Evidence.

Cross-examination:

The cattle had been driven, probably, one thousand miles from Texas to Wyoming.

Poteet, the defendant, started with the cattle from Haley's ranch 9 or 10 o'clock in forenoon.

Two or three animals in particular, I noticed had been badly crippled by being driven away. One red cow, road-branded "J," died.

Question by defendant's attorney. Was the contract of purchase, in writing?

Question objected to by plaintiff's attorney, on the ground that it is improper cross-examination, leading and irrelevant, and not material to the issues presented by the pleadings.

Objection overruled by the Court and exception noted.

Answer of witness. There was a contract for purchase of these cattle, in writing.

Attorney for defendant here presents a written document to the witness, and interrogates him as follows:

Question. Is this one of the originals of the contract for purchase?

(Objected to by plaintiff's attorney for same reasons, *i. e.* improper cross-examination, irrevelent, &c., objection overruled, and witness ordered to answer. Exception noted)

Answer of witness. This may be the paper. That looks like my signature.

Question by attorney for defendant. Did you execute any other paper while in Texas?

(Objected to as before by attorney for plaintiffs—ground, not proper cross-examintion. Objection overruled by court. Exception by counsel to ruling of court noted.)

Answer. I did.

Question by attorney for defendants. Did you see Poteet in Texas?

(Objected to as improper cross-examination. Objection overruled and exception noted.)

Answer. I did.

Question by attorney for defendants. Did Mr. Poteet come with you and the herd from Texas to the Little Laramie?

(Objected to by attorney for plaintiff as improper cross-examination. Objection overruled and exception noted.)

Answer. After we had started and been on the road several days, he overtook me and came on through.

Question by defendant's attorney. Did you ask permission of Mr. Poteet to dispose of or sell any cattle while on the road?

(Objected to by attorney for plaintiff, on the ground of improper cross-examination. Objection overruled. Exception noted.)

Answer. Did not ask permission to sell cattle.

Question by defendant's attorney. Did you ask permission of Poteet to sell or trade cattle at Fort Hays?

(Objected to as improper cross-examination. Objection overruled and exception to ruling of court by attorney for plaintiff.)

Answer. No, I never asked Poteet's permission to sell anything.

See pages 9 and 10 printed transcript of Record.

11th. That the said Supreme Court erred in sustaining the action and ruling of the district court before which this case was tried, in admitting in evidence to the jury on the trial of this cause, over the objection of the plaintiff in error, the following written instruments, the execution of the same not having been proved:

First Instrument.

STATE OF TEXAS, }
COUNTY OF TRAVIS, } ss:

These articles of agreement, made and entered into this day, by and between W. A. Morris, on the one part, and A. J. Gregory, of the second part, witnesseth:

1. That the said Morris hereby binds himself to deliver to said Gregory, in Llano county, Texas, between the first and fifteenth of April, 1873, one thousand head of cattle, more or less, said cattle to be road branded, and among them there are to be no cows that cannot be driven, or blind in one eye, or hipped, and the receipt of one thousand dollars, in gold, by said Morris from said Gregory, as part payment for said cattle, is hereby acknowledged.

2. That the said Gregory hereby binds himself to pay to said Morris for so many of said cattle as he receives, according to the following scale of prices, to wit:

For beeves, $12, in gold, per head; for cows, $7.50, in gold, per head; for three-year olds, $8, in gold, per head; for two-year olds, $5.50 per head; and for yearlings, $3, in gold, per head. Payment for said cattle, except the $1,000 gold, in cash in hand, above-mentioned, to be made on or before the first day of October, A. D. 1873, to Seth Mabry and E. B. Millett, at Laramie, in Wyoming Territory, with

the addition of exchange from the place of payment on New York city, for the benefit of said Morris.

3. The said Morris binds himself to furnish hands to assist said Gregory in his first day's drive, after he receives said cattle, and to furnish three hands to assist him on his second day's drive.

4. It is hereby expressly stipulated that the said Morris do have and retain a lien on each and all of the cattle he may deliver to said Gregory, by virtue of this contract to secure to himself the payment of all the balance of the purchase money that may be due him for said cattle, and the said Gregory doth hereby fully authorize and empower the said Morris, or whomsoever he may appoint in writing to represent him in the event that any of the purchase money for said cattle shall remain due and unpaid on the said 1st October, 1873, to sell either at public or private sale, all or sufficient quantity of said cattle to pay the amount of purchase money then remaining due and all costs of said sale.

This clause is not to be so construed to prevent the said Gregory from selling said cattle before the said purchase-money is paid, provided that the purchaser or purchasers of said cattle shall pay over to said Mabry or Millett the proceeds from said cattle or a sufficiency thereof, to pay off all the purchase-money for said cattle remaining due, and unpaid at the time of said sale.

5. The said Gregory hereby binds himself to pay the wages and expenses of one man to be denominated by said Morris, to go along with said cattle as agent of said Morris and retain possession of said cattle only in the interest of this lien, until said purchase-money is paid—wages to be paid said man and his expenses for the round trip.

Signed by the parties in triplicate—with scrawls for seals at Austin, this 26th day of February, A. D. 1873.

(Signed) W. A. MORRIS. [SEAL.]
A. J. GREGORY. [SEAL.]

Witnesses:
SETH MABRY.
E. B. MILLETT.

Question by defendant's attorney. Did you ask permission of Poteet to sell or trade cattle at Fort Hays?

(Objected to as improper cross-examination. Objection overruled and exception to ruling of court by attorney for plaintiff.)

Answer. No, I never asked Poteet's permission to sell anything.

See pages 9 and 10 printed transcript of Record.

11th. That the said Supreme Court erred in sustaining the action and ruling of the district court before which this case was tried, in admitting in evidence to the jury on the trial of this cause, over the objection of the plaintiff in error, the following written instruments, the execution of the same not having been proved:

First Instrument.

STATE OF TEXAS, } ss:
COUNTY OF TRAVIS, }

These articles of agreement, made and entered into this day, by and between W. A. Morris, on the one part, and A. J. Gregory, of the second part, witnesseth:

1. That the said Morris hereby binds himself to deliver to said Gregory, in Llano county, Texas, between the first and fifteenth of April, 1873, one thousand head of cattle, more or less, said cattle to be road branded, and among them there are to be no cows that cannot be driven, or blind in one eye, or hipped, and the receipt of one thousand dollars, in gold, by said Morris from said Gregory, as part payment for said cattle, is hereby acknowledged.

2. That the said Gregory hereby binds himself to pay to said Morris for so many of said cattle as he receives, according to the following scale of prices, to wit:

For beeves, $12, in gold, per head; for cows, $7.50, in gold, per head; for three-year olds, $8, in gold, per head; for two-year olds, $5.50 per head; and for yearlings, $3, in gold, per head. Payment for said cattle, except the $1,000 gold, in cash in hand, above-mentioned, to be made on or before the first day of October, A. D. 1873, to Seth Mabry and E. B. Millett, at Laramie, in Wyoming Territory, with

the addition of exchange from the place of payment on New York city, for the benefit of said Morris.

3. The said Morris binds himself to furnish hands to assist said Gregory in his first day's drive, after he receives said cattle, and to furnish three hands to assist him on his second day's drive.

4. It is hereby expressly stipulated that the said Morris do have and retain a lien on each and all of the cattle he may deliver to said Gregory, by virtue of this contract to secure to himself the payment of all the balance of the purchase money that may be due him for said cattle, and the said Gregory doth hereby fully authorize and empower the said Morris, or whomsoever he may appoint in writing to represent him in the event that any of the purchase money for said cattle shall remain due and unpaid on the said 1st October, 1873, to sell either at public or private sale, all or sufficient quantity of said cattle to pay the amount of purchase money then remaining due and all costs of said sale.

This clause is not to be so construed to prevent the said Gregory from selling said cattle before the said purchase-money is paid, provided that the purchaser or purchasers of said cattle shall pay over to said Mabry or Millett the proceeds from said cattle or a sufficiency thereof, to pay off all the purchase-money for said cattle remaining due, and unpaid at the time of said sale.

5. The said Gregory hereby binds himself to pay the wages and expenses of one man to be denominated by said Morris, to go along with said cattle as agent of said Morris and retain possession of said cattle only in the interest of this lien, until said purchase-money is paid—wages to be paid said man and his expenses for the round trip.

Signed by the parties in triplicate—with scrawls for seals at Austin, this 26th day of February, A. D. 1873.

(Signed) W. A. MORRIS. [SEAL.]
A. J. GREGORY. [SEAL.]

Witnesses:
SETH MABRY.
E. B. MILLETT.

said attorney-in-fact, Charles E. Poteet which he may legally do by virtue of the powers herein granted and conferred upon him by me. "Due and" interlined before signing.

Witness my signature at Austin, Texas, this 3d May, 1873.

W. A. MORRIS.

Witness attest:
JAMES B. MORRIS.
Z. T. FULMORE.

12. That said Supreme Court erred in affirming the judgment of the district court before which this cause was tried, and in not reversing the judgment rendered by the said district court.

Points of Law.

In regard to the first assignment of errors, the following points are suggested:

The defendants did not claim ownership of the property in controversy, but claimed to have a lien thereon by virtue of the contract above set forth.

See amended answer, page 22, printed transcript of Record.

By the statute of Wyoming this action under the issue made by the pleadings, the cattle having been delivered to Gregory, was similar to the action of trover at common law.

See section 195, Code Civil Procedure (1869) of Wyoming, which reads as follows:

"In all cases where the property has been delivered to the plaintiff, when the jury shall find upon issue joined, for the defendant, they shall also find whether the defendant has the right of property or the right of possession only, at the commencement of the suit, and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant."

And the rule as to damages is the same. The defendants could only recover the value of their lien, with interest.

See 6th edition Sedgwick on Measure of Damages, pages 627 and 628.

The value of the defendants' lien in this case was the balance due Morris (if any balance was due) on the contract.

The only evidence before the jury as to the value of defendants lien was contained in the contract and receipt above set forth.

See pages 13, 14, 15, and 16, Contract and Receipt above set forth and testimony in Bill of Exceptions, in printed transcript of Record.

By the receipt above referred to it appeared that on the 25th day of April, A. D. 1873, that the balance due Morris on the contract was $6,423.86 in gold. This sum, with interest at 12 per cent. per annum from the day the balance became due under the contract, to wit: the 1st day of October, A. D. 1873, up to the day of trial, the 16th day of March, A. D. 1874, was the measure of damages. The total amount, with interest, would be a little less than $6,780; the verdict of the jury was for $7,454.90; that being at least $674.90 too large. In this calculation of course it is taken for granted that there was proof that Gregory had not paid anything on the contract, to Morris, or to Mabry & Millet, after the 25th day of April, A. D. 1873.

The verdict of the jury should have been for the balance due on the contract in gold.

See Butler *vs.* Horwitz, 7th Wallace, 258; Bronson *vs.* Rodes, 7th Wallace, p. 229; and Trebilcock *vs.* Wilson, 12th Wallace, 687. Also case of Jones *vs.* Childs, 8th Nevada Reports, p. 121.

There was no evidence before the jury by which they could determine the damages, to wit: the balance due Morris on the contract.

There was no evidence tending to show that Gregory had not paid Morris or Mabry and Millett, the persons named

in the contract, the balance due thereon, after the 25th day of April, A. D. 1873, or a part thereof.

There was no evidence tending to show that anything was due Morris on the contract on the day suit was brought, or on the 1st day of October, A. D. 1873.

There was no evidence before the jury to enable them to "compute the difference between gold and currency."

As to the second assignment of error, the plaintiff complains that the instruction set forth therein is erroneous, because it assumes, without any evidence in support thereof, that the execution of the instruments was duly proved.

That Gregory had not paid or made a tender of the amount due on the contract.

That the contract introduced was the identical instrument under which Gregory bought the cattle.

That the cattle in controversy were the same mentioned in the contract.

That Poteet took possession of the cattle under and by virtue of a certain writing given in evidence.

That the defendant Morris retained a lien on the cattle without possession and without taking a mortgage on the cattle, as required by the laws of this Territory

See Poteet's Evidence, pages 16, 17 and 18, of printed transcript of Record; 3d Parsons on Contracts, 6th Ed., Title Lien, pp. 234 to 243; 1st Parsons, 569 to 572.

By this instruction the jury were not allowed to pass on any of the above points.

The instruction set forth in the third assignment is subject to the same objections that were made to the instruction set forth in the second assignment, and assumes the same facts to have been proved, in support of which no evidence was ever offered; and further assumes that the right to take possession of the cattle was given by the terms of the contract referred to. A reference to the contract will show that no such right or power is conferred by the terms thereof. The contract provides in express terms for a lien by continuous possession in the vendor, but nowhere pro-

vides for regaining possession after the same is lost; this instruction takes from the jury the question of fact as to whether the defendant, by neglect or carelessness, abandoned his lien and right of possession in support there of given by the terms of the said contract.

The evidence of plaintiff, pages 8, 9 and 10 of transcript printed of record, discloses the fact that defendants wholly failed to retain any possession for the first ten days after delivery to plaintiff, and the defendant, Poteet, confirms this by admitting that Gregory had exclusive possession for seven days.

See Poteet's evidence, pages 15, 16 and 17 printed transcript of Record.

The question of abandonment of lien and possession was an important fact upon which the jury should have been permitted to pass, because as a proposition of law a voluntary surrender of possession to the owner destroys the lien, and it cannot be recovered by resuming possession, whether the lien exists by virtue of a contract, or rights of vendors at common-law.

See pages 238 of vol. 3, Parsons on Contracts, 6th Edition; Wallace *vs.* Woodgate, R. & M., 193; Barnett *et. als. vs.* Mason, 7 Ark., 253; Lupin *et. als. vs.* Marie & Valet, 6 Wend., 77; McFarland *vs.* Wheeler *et. als.*, 26 Wend., 467; Boyd *vs.* Masely, 2 Swan., (Tenn.,) 661; Jordan *vs.* James, 5 Ham., (Ohio,) 88; Lander *vs.* Clark, 1 Hall, (N. Y.,) 394; Kallock *vs.* Jackson, 5 Georgia, 153; Strahorn *vs.* Union S. C. Co., 43 Ills., 424; Pomeroy *vs.* Kingsley, 1 Tyler, (Vt.,) 274; Grinnell *vs.* Cook, 3 Hill, (N. Y.,) 485; Walter *vs.* Whitmore, 1 E. D. Smith, (N. Y.,) 7; Wood's Addison on Torts, vol. 1, secs. 626–628; 1 East. 14; 7 do. 7; Urquart *vs.* McIvor, 4 Johns., (N. Y.,) 114; Nash *vs.* Mosher, 19 Wend., (N. Y.,) 431; 2 Kent's Com., 11th Ed., pp. 850–851.

The fourth assignment of error presents the same objections before discussed, and in addition thereto the following:

It assumes that a certain paper, offered in evidence over objection, is a power of attorney from Morris to Poteet, and

that by the terms of that instrument in writing, the rights of plaintiff, Gregory must be determined.

It assumes further that by the terms of a certain contract between Gregory, plaintiff, and Morris, one of defendants, that the right to take possession and sell, is thereby expressly given.

No such power is conferred by said contract. See page 3 of printed Record. The contract must be construed together as a whole, and its meaning thus determined. This contract, as a whole, constitutes a lien by continuous possession with power to satisfy by sale October 1st, but no power or authority is thereby given to recover possession when the lien is once lost, as in this case, by the neglect of the lienor, nor under such circumstances, is there any power or authority to sell.

The supreme court of the territory evidently construed the contract to be a conditional sale.

See opinion of Justice Fisher, page 31 of printed transcript of Record.

As to the 5th assignment of error, the court by the instruction complained of treats the contract between Morris and Gregory as a chattel mortgage with all its incidents and among other rights incident thereto, which the court by its instruction gives to the contract, is that of the right of redemption in the mortgagor after condition is broken.

See on this point, 1st vol. 6th Ed. Parsons on Contracts, 569 to 572. 3d vol. 6th Ed. Parsons on Contracts, 234 to 243.

It will be seen that the court assumes that Gregory had broken the terms of contract without any evidence whatsoever in support of that fact. And the court tells the jury by this instruction that the defendants had the right of possession. And they are instructed that the right of posession is the only thing in controversy so that all that was left to the jury was the question of damages. All the objections hereinbefore urged against the other instructions may rightfully be presented in this behalf.

The plaintiff insists that the lien of defendant Morris mentioned in said contract depended on his retaining his possession of the property, either in person or by agent.

See cases above cited, and particularly Barnett *vs.*

Mason, 2 Eng. (Ark.) 253; Pomeroy *vs.* Kingsley, 1st Tyler, (Vt.) 274; Grinnell *vs.* Cook, 3d Hall (N. Y.) 485; Walter *vs.* Wetmore, 1st E. D. S. (N. Y.) 7; McFarland *vs.* Wheeler, 26th Wendall, (N. Y.) 467.

This he failed to do.

See testimony of Gregory on this point, pages 8, 9, and 10, of printed transcript of record, and see also testimony of Willis Johnson and Ora Daley, pages 10, 11, and 12, of printed transcript of record.

The instruction set forth in the sixth assignment of error is erroneous, for the following reasons:

The right to sell may carry with it a right to make delivery after sale, but it cannot be said that the power to sell (if any be given by the contract in question) necessarily carried with it a right to take the cattle out of Gregory's possession before sale.

Gregory had a right, under the contract, to see that his rights in the premises were protected, and that a sale of the property be made under such circumstances and in such manner as would protect his interest in them, and this right is inconsistent with a right in Poteet to take the cattle out of his possession before sale, and do with them as he liked.

If Poteet had a right to drive the cattle to Alsop's ranch, he had a right to drive them back to Texas, or to any other place.

Conceding, for the purpose of argument, the right of Poteet to take possession before sale, he could only exercise that right in a lawful way, and before he could acquire the right to possession, he must first have made a demand on Gregory for the cattle or so many of them as would be necessary to pay the balance due Morris, stating the purpose for which he wanted possession, viz: to sell the cattle to pay the balance due; and until such demand was made on Gregory, and a refusal by him, a forcible taking by Poteet, as is shown in this case, (see Gregory's testimony, pp. 8, 9 and 10, of printed transcript of Record,) made him a trespasser, and he could not acquire any valid right to possession by those acts.

The acts of Poteet in taking possession of the cattle *vi et armis*, without demand, and his denial of the title of Greg-

ory, were acts inconsistent with the right of lien in Morris, even if such right then existed.

See Picquet *vs.* McKay, 2 Blackf., (Ind.,) 465; Lamotte *vs.* Archer, 4 E. D. S., (N. Y.,) 146; Everett *vs.* Coffin, 6th Ward, (N. Y.,) 603; Holly *vs.* Huggeford, 8 Pick., (Mass.,) 73.

The instruction requested and set forth in the seventh assignment of errors, is based on the theory: That a lien admits absolute title in a lienor; that a lien can only be maintained by a vendor by keeping continuous possession, either active or constructive.

See cases above cited; and argument and points made as to the other instructions given.

The alleged error contained in the eighth assignment is that the verdict of the jury was not in due form as required by law, and not in such form that a judgment could be lawfully rendered thereon. And the same question is raised in the ninth assignment. The two may, therefore, be considered together.

See page 27 of printed transcript of Record.

Two objections are urged to the form of the verdict:

1st. The assessment of damages was erroneous. The defendant, C. E. Poteet, was at most—admitting that the power of attorney above mentioned was duly executed by the defendant Morris—the mere employé of Morris, and had no interest in the property in question, and here he has a verdict for damages with the defendant (Morris) for $7,454.90.

See *Coe* vs. *Peacock*, 14 *Ohio State R., p.* 187; *Powell on Appellate Proceedings, pp.* 145 *and* 146; *Hewson* vs. *Sutlin & Smith*, 7*th Ohio*, 232; 2*d col. Nash, Pleadings and Practice*, 828 *and* 829.

The assessment of damages was erroneous also, because there was no evidence before the jury of the value of the special property of either or both defendants in the cattle in controversy. There was no evidence offered or given that tended in the least to show how much, if anything, was due Morris from Gregory on the contract at the time suit was brought; the only evidence that would intimate that

anything was due Morris on the contract was the statement of Poteet that "on the 2d day of October I made a proposition to Gregory to take $2,000 in cash, and the balance in 90 days; that was my ultimatum. They did not pay the money."

See Poteet's testimony, page 16 of printed Record.

From this it might be inferred that something over $2,000 remained unpaid and due on the contract on the 2d of October, but just how much we do not know, any more than we know how the jury arrived at the verdict. There is nothing to show that Gregory did not pay to Mabry & Millett all that was due before the cattle were taken from him by Poteet. On this point see 20 Wisconsin R., p. 23, and cases there cited.

The defendants, by their amended answer, admitted the title of Gregory, but did not allege that he had failed to pay the balance due on the contract, and even if the record had contained any evidence of a balance being due, it would have been error in the court to have permitted the evidence to go to the jury.

The rule of evidence is that the *allegata et probata* must correspond.

2d. The verdict was not in form or in substance as required by the statutes of Wyoming, because the jury did not find by the verdict that the defendants, or either of them, were entitled to the right of possession or property in the cattle in question at the time suit was brought. This objection to the verdict is based on the provisions of section 195 of the Code of Civil Procedure above set forth.

The verdict in replevin must be special. (See sections 289 and 290, of Code of 1869,) which read as follows:

Section 289. "The verdict of a jury is either general or special. A general verdict is that by which they pronounce, generally, upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them, and they must be so presented as that nothing remains to the Court but to draw from them conclusions of law."

Section 290. "In every action for the recovery of money only, or specific real property, the jury in their discretion may render a general or specific verdict. In all other cases the Court may direct the jury to find a special verdict, in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk, and entered on the journal."

See Powell on Appellate Proceedings, pp. 145 and 146; Hewsen *vs.* Saflin & Smith, 7th Ohio R., 232; 2d Vol. Nash on Pleading and Practice, pp. 828 to 832, and 986, 987, and 988; Wolf *vs.* Meyer, 12th Ohio State R., 432; McKeal *vs.* Freeman, 25th Indiana, 151; 12th Ohio, 112; 13th Wisconsin, 18; 22d Wisconsin, 541; 30th Wisconsin, 200. See Seny's Code, (new,) pp. 273, 376, 377, 378, and 379.

The statute above set forth, and the code of procedure, from which the section referred to is taken, is a copy of the Ohio Code, and it is a rule of law that when the legislature adopts the law of another State it adopts the construction given it by that State. The Ohio cases cited hold a general verdict to be defective; this is admitted by the supreme court of Wyoming.

See Opinion of Hon. Fisher, C. J., p. 32 of printed transcript Record.

The next error complained of is contained in the tenth assignment, in which it is alleged that the Supreme Court erred in sustaining the district court in overruling the motion of plaintiff for a new trial.

See Miles *vs.* Buchanan *et al.*, 36 Indiana R., 490.

The motion for a new trial presents several questions.

The first we shall notice is the ruling of the district court in allowing certain questions to be asked of the witness, A. J. Gregory, by defendants on cross-examination.

See Gregory's testimony, above set forth, and pp. 9 and 10 of printed transcript of Record.

The several questions were clearly improper on cross-examination, and were leading, incompetent, and irrelevant and immaterial.

The refusal of the Court to give the instructions requested, and above set forth in this assignment, was error.

See cases above cited, and points presented.

That part of the fourth requested instruction in regard to the necessity of proving the execution of the written documents introduced in evidence raises a question to be discussed under the eleventh assignment of error, viz: The improper admission of the said documents in evidence without proof of their execution.

On this question we will now consider under the eleventh assignment.

The execution of these documents was not proved.

1st Greenleaf on Evidence, section 569 *et sequitur;* 2 Phillips on Evidence, pages 386-7-8-9, 394, and cases there cited; 9 Johnson, 136 (Willoughby *vs.* Carleton;) 15 Pick., 534; 5 Cowin, 383 (Jackson *vs.* Edson *et als.*;) 13 Wendell, 188 (Jackson *vs.* Waldron;) 5th Car. & Payne, 48; 2 Serg. & Rawle, 420; Simpson & Co. *vs.* Dall, 3 Wallace, 460; Wiggins *et als. vs.* Burkham, 10 Wallace, 129; Generes *vs.* Campbell, 11 Wallace, 193; Gregg *vs.* Moss, 14 Wallace, 564.

The only mention of these papers made by any witness that touched on the question of execution was made by the witness Gregory, in answer to the question—

"Is this one of the originals of the contract for the purchase?" He answers, "This may be the paper; that looks like my signature."

See cross-examination, page 9 and 10 printed transcript of Record.

But one paper was shown to the witness, and three documents were allowed to be read to the jury.

See pages 10 and 13, 14 and 15 of printed transcript of Record.

But it can scarcely be considered profitable to discuss these minor questions further. The action of the trial court in this case in giving and withholding instructions against the objections and exceptions of the plaintiff, and in sustaining the verdict and judgment in the case, involves questions going to the very heart of the case, and if the positions taken by plaintiff in respect to these questions are vindicated here there can be no doubt, we apprehend, as to what the action of this court should be.

M. C. Brown,
W. W. Corlett,
Counsel for Plaintiff in Error.

Supreme Court United States.

No. 227.

A. J. GREGORY,

Plaintiff in Error.

vs.

W. A. MORRIS and C. E. POTEET,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

By SHELLABAGER & WILSON,

Attorneys for Defendants in Error.

Thomas McGill & Co., Printers, Washington, D. C.

Supreme Court of the United States.

No. 227.

A. J. GREGORY, Plaintiff in Error,

vs.

W. A. MORRIS and C. E. POTEET, Defendants in Error.

Brief for Defendants in Error.

We need not incumber this brief with a restatement of the facts in the case, since these are very simple, and are substantially stated in the plaintiff's brief. Wherein that brief omits any that are material, we will state them in the appropriate connection below.

We think the first impression made by a glance at this record is, that it presents a case where the plaintiff in error is conducting a deliberate attempt to defraud the defendants in error out of a just debt, which the plaintiff has not denied to be owing, and hence the plaintiff comes to the court with all the leaning of the law against his fraud.

The first assignment of errors is on 4th page of brief, and is based on a charge to the jury, that the verdict must be in dollars and cents, and that, should they find the contract required payment in gold, then the jury must compute the difference between gold and currency, and render their verdict in dollars and cents in currency.

We cannot suppose this assignment of error good, because—

First. Even if there were technical error, yet it is harmless, because it secures the defendant below the right to discharge his debt in paper exactly *equivalent in value* to the gold which the assignment in error says the judgment should have called for.

Second. There is nothing in decisions of this court, cited in the brief of plaintiff in error, that requires, in a case where, by the contract, payment in gold is provided for, that the judgment *shall* be for payment in gold. It is only decided that payment *may* be adjudged in gold.

There being, by law, a currency other than gold, which is a legal tender for the payment of debts, public and private, it is certainly competent for the court to place the indebtedness in such a form, by its judgment, that these legal-tender notes shall be available to the judgment-debtor in making payment, provided they are made equivalent in value to the coin debt. No harm comes to him by reason of such a judgment, and there is nothing of which he can complain. Such a judgment does substantial justice between the parties.

The Code of Wyoming (section 149 of the revision of 1869, and section 134 of the revision of 1876) provides—

"The court, in every stage of the action, must disregard any error in the pleadings or *proceedings* which does not affect the substantial rights of the adverse party; *and no judgment shall be reversed or affected by reason of such error or defect.*"

The placing this indebtedness in such a form by the judgment of the court as that the judgment-debtor could pay the full coin value of the debt in the currency most commonly in use instead of gold, which practically is only an article of merchandise, does not affect the substantial rights of the plaintiff in error.

Third. Besides this, if the judgment had been rendered for gold according to the contract, suppose the judgment-debtor failed to pay, then the debt must be made by sale of property on execution. How is the sheriff or marshal to procure the gold? When he sells, the purchaser may by law

assert his right to pay the purchase-money in legal-tender notes. Must the officer go into the market and buy gold with these legal tenders? We deny that the officer could sell and require payment in gold; but, on the contrary, can only make on execution and pay an amount of legal tenders equal in value to the gold judgment. But if he could sell on execution for gold alone, no advantage could accrue to the judgment-debtor by so doing. We deny the right of the officer to sell legal tenders derived from a sale, in order to procure gold; but if he can do so, it is no advantage to the judgment-debtor to have it done. The creditor may, if he will, waive payment in gold and accept its equivalent in legal-tender notes. If he does, the judgment-debtor has no substantial ground of complaint. In any view that can be taken of this, no wrong has been done to plaintiff in error. But, independently of all the foregoing, since nothing in the record shows that there was any evidence or pretense that the defendant below, if entitled to any damages, was entitled to less than the amount of his debt, and since that amount was liquidated by the written agreement, therefore the legal presumption is that the verdict and judgment were warranted by law. (Boley *v.* Griswald, 20 Wall., 486.)

Second Assignment of Error.

As to this, it seems to us so plain, under the pleadings in the case, "that the contract, bill of sale, receipt, and power of attorney necessarily explain and define the rights and interests of the parties," &c., that comment is needless. Nothing affirmatively appears in the record which prevents these instruments from being applicable in the case and binding on the party according to their purport. Hence this charge is obviously right.

Third Assignment.

The instruction complained of is, we think, clearly not erroneous. The contract expressly provides that Morris, defendant in error, shall have and retain a lien on the

property, and expressly gives him the power to sell it to pay the debt; and whatever may have been the rights, *as between him and innocent third parties, in the event that the property had passed into the possession of the latter*, there can be no question that, *as between these parties*, the plaintiff in error had the right, under the contract, upon default to take possession of and sell the property.

It is the merest elementary law which teaches us that, *as between themselves*, and touching the right to retain or to retake possession of a chattel, the vendor and purchaser may make just such stipulations as they may please; and when made, these stipulations will control the right of possession, whether the question of right may arise in replevin or in other action. (See such cases as Gaylor *v.* Dyer, 5 Cranch., C. C., 461; Sawyer *v.* Fisher, 32 Maine, 28.)

Fourth Assignment of Error.

We are unable to see any ground of error in the instruction so complained of. By the contract, the defendant in error had a right to take possession of this property; and if he did so for the purpose of selling it, as it was stipulated he might, it necessarily followed that they must find the right of possession in the defendant in error and hence must assess such damages as were just and proper.

The instructions to be construed in connection with the pleadings. A contract existed between the parties, as shown by the record; and this shows clearly the right of the defendant in error to take possession of this property and sell it, and when he did take possession pursuant to this contract, of course the right of possession was in him.

Fifth Assignment.

There is no error in the instruction here complained of. The plaintiff in error having stipulated, in writing, that the defendant in error should retain the possession of the cattle, and defendant in error having taken possession pursuant to that agreement, then clearly the plaintiff in error

had no right to take them from his possession, by writ of replevin or otherwise, unless he paid or tendered the amount that was due under the contract.

Sixth Assignment.

It certainly cannot be doubted that the court did right in saying to the jury that the right to sell the cattle carried with it the right of possession. The right to sell, without the right of possession, would amount to nothing. Such a right would be wholly unavailing for the purpose for which the right to sell was given, to wit: the payment of the amount due under the contract. It would be impossible to sell the cattle without the possession and without the ability to deliver the possession to the person to whom sold.

Seventh Assignment.

In this it is complained that the court erred in refusing to charge the jury touching a redelivery to vendor, as requested by the plaintiff in error. The answer to this is found in the contract itself. As we have before seen, that contract expressly stipulates that the defendant in error, Morris, was to have and retain a right to repossess or hold this property, and to make sale of it. And, as we have before said, this being a *controversy between the parties themselves* to that contract, the mere fact that Gregory, the plaintiff in error, might have obtained for any period of time the possession of the property, would not destroy this contract right to the possession and the sale by the defendant in error, according to contract. This violated no statute or law, was a legitimate subject-matter for contract, and, when made, bound the parties according to its terms. It need not be called a lien or mortgage, but it was a CONTRACT RIGHT to retake possession and make sale.

It seems to us that the proposition set forth in this instruction, which was refused,—that if Morris, by his own fault, or carelessness, or negligence, permitted the possession of the property to pass to Gregory, Morris thereby lost

his lien and all right of possession,—is, on these facts, a legal absurdity. If Gregory, having thus obtained the possession, had then transferred the property to an innocent third party, and the controversy was between the third party and Morris, then the question, as to the rights of the parties, might be very different. But Gregory, as against Morris, could not legally set up any such claim as is set forth in this instruction. Aside from this, there is nothing in the record to show that any such loss of possession by Morris occurred. In the absence of evidence in the record showing such loss of possession, this court will *presume* that there was nothing in the facts of the case upon which any such instruction could properly have been predicated. The record must show affirmatively that the fact was in the case on which this assignment of error is based, to wit: loss of possession by Morris. But it is not in the record.

Eighth and Ninth Assignments.

The complaint here is that the verdict was not in due form as required by law. The questions at issue in the case were: 1st, Was the plaintiff in error the owner *and* entitled to the immediate possession of the property? 2d, Did the defendant unlawfully detain the property from the possession of the plaintiff in error? And 3d, (which is involved in the second, above,) Had the defendant Morris the right to hold the possession and sell the property for the payment of this purchase-money?

On the trial of the case the jury found the following verdict (see p. 23 of record): "We, the jury, find for the defendants, and assess the damages at $7,454.90." This verdict is not repugnant to any of the issues in the record, nor are there any such issues in the record as render such general verdict bad, and cannot be held void for this reason.

It is consistent with the issue as to whether or not the plaintiff in error was the owner and entitled to the possession.

It is consistent with the issue as to the wrongful detention by the defendants or either of them. It is consistent

with the issue as to whether or not the defendant Morris, under the contract, was entitled to hold, and did hold, the possession of the property, and there is no inconsistency or repugnancy between either of these issues; and the issues not being repugnant to each other, and the verdict being in harmony with each and all of them, it cannot be held to be void on account of repugnancy. Therefore, the only question that is left, growing out of the form of the verdict, is whether or not this verdict shall be regarded as insufficient, under the laws of the Territory of Wyoming, in relation to verdicts in replevin cases.

It seems to be claimed that this verdict is insufficient, because the jury in the verdict did not find the defendants had the right of property or the right of possession, and that is predicated upon section 195 of the Civil Code of Wyoming of 1869, which provides as follows: "In all cases where the property has been delivered to the plaintiff, when the jury shall find upon issue joined for the defendant, they shall also find whether the defendant has the right of property or the right of possession only at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant, for which, with costs of suit, the court shall render judgment for the defendant."

But, in addition to this, it is provided in the Code of Wyoming, sec. 149, (revision 1869,) 134, (1876,) that "the court, in every stage of the action, must disregard any error in the pleadings or *proceedings* which does not affect the substantial rights of the adverse party, and *no judgment shall be reversed or affected by reason of such error or defect.*"

This was intended to provide, and does provide, that judgment shall not be reversed for defects in the pleadings or proceedings which do no substantial injury; that, where it appears from the face of the record that substantial justice has been done, the judgment shall not be reversed.

Now, it is plain, from the face of this record, that no substantial injury has been done to the plaintiff in error by the

form of this verdict. It is perfectly plain by the contract and the receipt, which are in the record and which will be found at pages 13, 14, and 15, that the plaintiff in error owed the defendant in error the sum $6,423.80, in gold. There is not anywhere in the record anything tending to show that the plaintiff in error had ever paid this indebtedness, or any part of it, or offered to pay it. If there had been anything in the case indicating or proving such a fact, it would have appeared in this record. As before stated, the record does not profess to set out all of the evidence, but it is not to be presumed that, if there had been any evidence showing that payment had been made or tendered, that the plaintiff in error would not have caused that fact to be presented in the record.

It is therefore very manifest that the above sum was due and unpaid.

Now, here is the judgment, rendered against this plaintiff in error for the amount that was due from him on the account of this indebtedness. He had taken, by writ of replevin, out of the possession of the defendant in error, the property which the defendant in error had the right under the contract to hold and sell to satisfy this indebtedness. It is impossible to see how the rendition of this judgment against him for the amount of this debt, manifestly due from him, and the means to procure the payment of which he had by this proceeding taken out of the hands of the defendant in error, could work any injury to him or do him any injustice whatever; and while, therefore, the jury did not, in their verdict, say anything in regard to the question of the right of possession, as between the parties, that omission does the plaintiff in error no harm; and, under the statute which we have above quoted, it being apparent to the court that in the "*proceedings in the case*" no substantial right of the adverse party had been affected, the court could not, without an absolute disregard of that statute, reverse the judgment.

The plaintiff in error had acquired the possession of the property under the writ of replevin. He had deprived the

defendant in error of the possession which the latter under the contract was entitled to have. The plaintiff in error had the property and he owed the debt. Under this judgment, he retained the property, and the defendant in error had the judgment for the money due him. Of this the plaintiff in error has no right to complain; and for such a defect in the verdict, if it shall be considered a defect under the statute above, the judgment could not be reversed.

See Boley *v.* Griswald, 20 Wallace, 486.

ELEVENTH ASSIGNMENT.

This goes simply to the question of the admissibility of the contract, the receipt, and the power of attorney in evidence. Under the first and second answers, these papers were competent as evidence. Under the third answer, there can be no question as to their admissibility. It is claimed in the brief that there was no proof of the execution of these instruments. This objection is unavailing, because, as before stated, the record does not profess to set out all the evidence in the case, and it must, therefore, be presumed that the execution of these instruments were properly proved.

TWELFTH ASSIGNMENT.

This, in general, embraces what we have hereinbefore considered. The point is made in the brief that the judgment is in favor of the defendants jointly. This is in a matter of which the plaintiff in error has no right to complain. It is nothing to him that the judgment is in favor of both of these parties. He saw fit to sue them jointly. All the facts of the case and the rights of the parties appear on the record. The record is a complete protection to him against any further demands by either of the parties or both of them for the indebtedness, and would be a bar to any future suit against him by either or both of the defendants. It is also claimed in the brief that there was no evidence from which the jury could compute the difference

between gold and currency, so as to ascertain the amount of the verdict. To this we answer, that there was nothing in the record showing that there was no such evidence before the jury, and unless it affirmatively appears by the record that there was no such evidence, the presumption must be that the evidence necessarily had been produced to the jury.

We refer the court to the opinion of Chief Justice Fisher in this case, pages 29 and 30 of the record. We ask that the judgment below be affirmed.

SHELLABARGER & WILSON,
Attorneys of Defendants in Error.